THE OFFICE and DUTY OF EXECUTORS:

Or, A TREATISE of *Wills* and *Executors*, directed to *Teſtators*, in the choice of their *Executors*, and Contrivance of their *Wills*.

With Direction for *Executors* in the Execution of their Office according to the Law; and for *Creditors* in the recovery of their Debts.

With divers other Particulars, very uſeful and profitable for all Perſons, be they either *Executors*, *Creditors* or *Debtors*.

Compiled out of the Body of the Common Law, by *Thomas Wentworth*, late Bencher of *Lincolns* Inn.

To which is added

An Appendix, wherein are the nature of Teſtaments, Executors, Legataries general, and divers other very material things relating to the ſame, ſhortly Methodized for the uſe of Perſons concerned.

By *T. M.* Eſquire.

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The *PREFACE.*

AMidſt the Readers of theſe Diſcourſes, ſome not yet unfriendly may ask, perhaps, *Quorſum hæc?* or *Quorſum ſic?* Why have we a Tractate and Diſcourſe Legal? or, Why in *Engliſh*, and not rather in the Law-language? To whom, yea alſo to others perhaps leſs inquiſitive, it will be, as I think, a thing not unpleaſing, to hear ſome reaſon rendred, why I have ſet my Head and Hands to this Work ſo little in uſe with thoſe of our Profeſſion; why alſo in *Engliſh* rather than in the Language wherein our Volumes of Law are for the moſt part and well-nigh wholly written.

Firſt, For the matter, *viz.* my thus Commenting or making a Tractate upon a Legal Theme.

I have long and ſtrongly conceived, that the more Nobles, Gentlemen, and others, ſhall be acquainted with the Law of the Land, and the Juſtneſs, Equity, Prudence and Providence thereof, the more they will love it and

affect it. *Ignoti nulla cupido*, The want of knowledge of it cauſeth the leanneſs of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a means as well to advance it in their eſtimation, as to advantage them by it.

2. I have long thought, that we, who are the Profeſſors of our Law, have been more wanting to it than the Civilians and Canoniſts to theirs, who have written very many Volumes. *Spartam quam nactus es, hanc exorna*, hath been ſaid of old, and ſhould be aſſayed anew.

3. More wanting than others before us of our own Profeſſion have we alſo been, as I think: yet, as of old *Britton*, *Glanvil*, *Bracton*, beſides not printed, *Fleta* and *Ingham*, did lead the way; ſo ſince, Maſter *Littleton*, and, more lately, St. *Germin*, *Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitchin*, Sir *Henry Finch*, *Dalton*, have trodden this path; ſo as it cannot be taxed with Novelty or Singularity. I mention not Relaters or Reporters of Judgments and Reſolutions, nor meer Abridgers, nor Authors of Books of Entries, expreſſing forms

forms of Declarations and Pleadings, *&c.* becauſe theſe have trodden another, (though for the Students and Profeſſors of the Law a very profitable) path.

The tax and increpation of our late learned and judicious Sovereign upon us the Profeſſors of the *Engliſh* Law, as being wholly in effect addicted to our own private gain and advantage, with neglect of the publick, had ſome ſtrong operation upon me, howſoever upon others; ſetting for divers years paſt my Pen on work, eſpecially in Summer Vacations, upon divers particular Subjects, whereof this is one and the firſt-born. 4. King *James* in his Preface to his Book against Tobacco.

To this I may add the Crowns expectation of ſomewhat Legal to be publiſhed and ſet forth from time to time, as appears by the ſpecial Patents ſucceſſively granted and renewed for the ſole Printing of Books of Law. There is one ſuch in force at this preſent, and another long hath been in Remainder and expectancy to take effect upon the expiration thereof. 5.

And now to adjoyn *Sic* to *Hæc*, viz. the reaſon of my *Engliſh*-writing, to that 6.

of my writing upon a Law-Theme.
March 1609 First, receive the ſaid late Kings judgment touching both, expreſſed in one of his Speeches printed. "Thus I wiſh, "ſaith he, the Law written in our "vulgar Language: For now it is an "old mixt and corrupt Language, on-
Note. "ly underſtood by Lawyers; whereas "every Subject ought to underſtand "the Law under which he lives, *&c.*

7. Herein *Andrew Horn*, one ſometime
In his Mirror of Juſtice. of our Profeſſion, agreeth with the ſaid late King, ſaying, *Abuſio eſt que les Leges ovveſque lour encheſons ne ſoient ſcæus & conus del touts*: It is an abuſe, ſaith he, that the Laws with the grounds be not known by all. *Ergo*, to be in a tongue underſtood by all.

8. More plainly and fully doth that our both well-learned and well-deſcended St. *Germin* ſing in conſort with our ſaid
*Lib.*1. c.24. late ſcientious King. For he firſt brings in the Doctor of Divinity, ſaying that henceforth he will take more pains than before he had done to know the Laws of *England*; for that knowledge is *multum neceſſaria & Clericis & Laicis, imo omnibus in hoc Regno commorantibus, etiam in foro Conſcientiæ.* And this being

ing in his firſt Book written in *Latin*; after writing his ſecond Book in *Engliſh*, he expreſſeth that he ſo did for this reaſon, *viz.* To the end that it might be underſtood by all.

Which of us hath not heard it objected, that we the Profeſſors of the Law ſeek to hide and ſecret the knowledge thereof under that dark and diſtaſted Language wherein the Law is for the moſt part written? Not that I hold it any juſt excuſe for the neſcience or negligence of any, that our Books are not in *Engliſh*; ſince, firſt, it were eaſie for any diligent and intelligent Man, ſpecially if acquainted with the right *French* Language, to underſtand our broken or brackiſh *French* in a few days. Secondly, There be both Statutes and ſome other Law-Books in *Engliſh*, which are neglected by the moſt. Thirdly, Though care hath been taken in Parliament in *Edward* the thirds time, that Lawyers ſhould plead, that is, argue and debate Cauſes, in *Engliſh*, which was often deſired by the Nobles and Commons, till at laſt aſſented and enacted; and in Q. *Marie*'s time care was taken, that the Commiſſions 8.

36 Ed 3 c. 15

2 & 3 Ph. & M. c. 6. in fine.

ſions of Purveyors ſhould be in *Engliſh*, to the end that all Subjects, from or of whom they would take, might both ſee them to be perſons authorized, and ſo alſo in what manner they are directed to uſe their Authority, according to the Princes pious and princely care, that his Subjects ſhould not be abuſed by his Officers: Yet for this Affair, of having all the Law-Volumes ſpeak *Engliſh*, I have not heard nor read of any deſire or endeavour in Parliament. Fourthly, If the Annals and Reports were in *Engliſh*, they are ſo replete with Debates about forms of Writs, Returns, Pleadings, Eſſoigns, Imparlances, Protections, Vouchers, Aid-priers, and Counter-pleas of both, and the like, as would eaſily diſtaſte and diſcourage any, not intending to profeſs and practiſe the Law, from verſing much in them, or paſſing through them. This therefore, as I think, would not much effect the expreſſed deſire.

10. The thing (in my judgment) fit and fruitful to produce that good effect would be, to have Extracts of the Materials of the Law, and that not without ſome good choice and ſelection, compoſed

poſed in way of Diſcourſe, or Tractate expoſitory, and that in *Engliſh*.

I cannot well ſee or comprehend how any one Legal part or Theme may be more uſeful to and for the generality of Men, and conſequently more generally expetible and wiſhed for, than the *Office of Executors*. For who almoſt is there, who either is not, or may not be an Executor or Adminiſtrator; or at leaſt hath not, or may not have to do with them, either to receive from them, or to pay to them Debts or Legacies? Or who is there above *Forma pauperis*, that may not be a Teſtator or Will-Maker, to the guidance of whom, even in the choice of his Executors and contrivance of his Will, it cannot but be material to know the Office and Duty, the Right and Intereſt, the Power and Authority of *Executors*? yea of each one Executor, where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be faſhioned, generally or ſpecially; what ſhall come to him, what cannot be given from him; yea, what Goods or Chattels ſhall go from him, though not given

II.

given from him? Beſides the knowledge for thoſe others neceſſary, of the ſafeſt Wards or Locks for Executors, their *Scylla* and *Charybdis*, and the beſt advantage for Creditors, *&c.* towards or againſt them. To me, conſidering what parts of Law were moſt behoveful to be communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the firſt and leading place. Thus mine own thoughts. But how far this Diſcourſe may be profitable to any, and how many, *aliorum ſit judicium.* How many know no more of theſe, then of the way of a Ship upon the Sea?

12. Laſtly, Theſe are not intended for the Learned of our Profeſſion, who have drawn, or can draw, out of the ſame Fountain which I did, and ſo need not my help; but for their ſakes who are not Profeſſors of the Law: yet ſo, as if any young Students may in any part receive fruit by my Labour, I ſhall not grudge or repine at their ſo doing. *Bonum quo communius, eo melius.*

THE

THE TABLE.

A.

ADminiſtration: *whether Letters of Adminiſtration may, or muſt be granted.* 4,143
Aſſets: *what ſhall be ſaid to be Aſſets in the Executors hands.* 45,92,100, &c.
Action: *where many Executors, in and againſt whom were the Action to be brought.* 47
Adminiſtration: *what ſhall be ſaid to be an Adminiſtration to determine an Execution.* 57,58
Account: *Executor to be bound to make a true account.* 72,73
Averia: *what the word means.* 82,83
Attachment: *what may be attached, what not.* 87
Action: *to whom choice in Action doth belong.* 92
Avowry: *who ſhall avow; and where, when, and for what.* 95
Aſſignee: *Executor the Teſtators Aſſignee in Law, and the force thereof.* 144,168

Audita

Audita querela: *where it will lie, and for whom, and what.* 146,190,193,196
Apparel *to a Wife muſt be according to her Degree.* 150
Abatement: *where a Writ ſhall abate.* 150, &c. 169
Auditors, *by Statute Judges of Record.* 169
Age: *the ſeveral Ages of Men and Women, at which acts may be done or ſuffered,* &c. 300, &c.
Aſſent *of an Executor effectual to remainders; and how, where, and when.* 337, &c.
Aſſent of an Executor abſolute of what force and validity, and the like of an Aſſent conditional. 340,341
Adminiſtrators, *in effect, the ſame with Executors.* 370

B.

Bona notabilia: *what ſhall be ſo called, and the value thereof, and how they cauſe a Will to be ſeverally proved,* &c. 64, &c.
Burial *of the dead neceſſary, and why.* 186, 187
Bequeſts *perſonal, how they may be loſt, forfeited, or revoked.* 345, &c.
Bequeſts: *what will paſs under the name of Bequeſts,* 359, &c.

C.

Codicil, *annexed to a Will formerly revoked, reviveth the ſame.* 35
Creditor *made Executor may pay himſelf firſt.* 46
Chattels real poſſeſſory: *what ſhall be taken to be ſuch, what not.* 74, &c.
Chattels perſonal: *what ſhall be and be accounted ſuch, and what not.* 79, &c.

Capias. *No* Capias *againſt an Executors body for the Teſtators Debt.* 126
Coſts. *Executor to pay no Coſts, where and when.* 148
Contract. *Debts by Contract when and how to be paid by Executors.* 171, &c.
Covenant. *Where an Action of Covenant will lie againſt an Executor, and where not.* 177, &c.
Where an Executor is chargeable by Covenant, and where not, 179, &c.
Conſcience. *What an Executor is bound to do as matter of Conſcience.* 371, 372

D.

Deviſe. *What may be deviſed by Will, and what not, and by whom.* 25, &c. 33, 36
Debts *bequeathed by Will muſt be ſued in the Executors name.* 26
Debts how and when to be paid by the Executor, and their kinds. 39, 167, &c.
How a Debt may be forgiven by Will, and how not, and how extinguiſhed. 43, &c.
Debtor. *Executor is no Debtor, but a Detainer only, and as ſuch muſt ever be ſued.* 125, 210
Damage-feaſant: *what ſhall be ſo adjudged and taken, and by whom.* 133
Default *of one Executor ſhall not be a total Default to all.* 141
Debt. *Action of Debt, what ſufficient thereto, and what not.* 167
Demand. *What ſhall be a good Demand, and what not.* 206, 207

Diſtreſs, *where, and how, and of what, and the effect thereof.* 217, &c.
Diſability, *Where an Executor ſhall be diſabled to aſſent.* 325, 326,
Deviſee *for life, how, where, and when he may fruſtrate his Remainder in a term.* 343, 344

E.

Executor, *how relating to a Will.* 3, 4, 7, 11
His Definition. 3
How and where liable to pay his Teſtators Debts, and why, and where not. 6, 7, 8, 154, 155, 162, 164, 184, 185
His Duty. 8, 225
What words make an Executor, what not. 12, 13
After what manner ſuch may be made, and how they may be limited. 14
Executors conditional, *who.* 15, 16
How their powers may be divided. 17, 18, 19
Who may make and be Executors, and who not. 21, &c. 44
Excommunicate *perſon cannot ſue.* 24
Executorſhip *may be revoked, and how.* 32, 33, 37
Executor may pay what Creditor he will firſt, not inverting legal order. 46, 205, &c.
Where all the Executors are to be named, and where not. 59, 60, 136, &c. 150
Where an Executor may pay himſelf, and how, and with what. 113, 114, 204, 205
Executors, though never ſo many, ſhall have but one Eſſoign. 137

Eſtovers *to be joyned by an Executor though not named, where, and how.* 147, 148
Where an Executor ſhall be excuſed from payment, and why. 162, &c.
Where an Executors own Goods ſhall be liable, though no Waſte. 276, &c. 321
Executor bound by his own Aſſent to a Legatee. 323, &c. 341
Executor of an Executor *his power & duty.* 368, 369

F.

Fee-ſimple: *Lands in Fee-ſimple deviſable by Will, and how.* 5
Fees *upon Probate and Copies of Wills, and Inventories.* 71, 188, 189
Funeral-charges, *what ſhall be allowed for the ſame.* 187, 188, 249, 250
Fee-farm *Rents, how and when payable to Sheriffs.* 194
Feme-Covert: *where a Woman-Covert may make a Will, and how.* 282, &c.
Whether ſuch may be made Executors without their Husbands conſent, and what they can do if he conſent. 291, &c.
Fee-ſimple *cannot afford Remainder, how, where, and why.* 333

G.

Goods: *what Intereſt an Executor hath in his Teſtators Goods; and how it differs from proper and abſolute Intereſt.* 122, &c.
Where a Teſtators Goods are purloyned or imbezilled

zilled by ſtrangers or others, what remedy to recover them, and when, and where. 157, &c.

H.

Heir, *where chargeable by Bonds, and where not.* 48
What ſhall go to the Heir, to the Executor, and what may be done by either of them to recover their right. 75 76, 81, 86, &c. 97 99, 132, &c.
Husband and Wife *Executor, the Wife cannot anſwer without her Husband.* 140, 321

I.

Inteſtate. *Where a Man ſhall be ſaid to die Inteſtate, though he make a Will in writing.* 5, 15, 19, 290
Inventory *how to be made, before whom, and of what.* 72
Judgment. *Where Adminiſtrator cannot have Execution of a former Judgment, and why.* 148, 149
Judgments where, and how to be paid by Executors, and why. 195, &c.
A later Judgment to be preferred before a precedent Statute. 196
Upon Judgments in inferiour Courts, how, where, and when Execution may be had into any Court of England. 199
Infant: *how, where, and when an Infant may make a Will, and how not.* 305, 306
When and where an Infant may be made an Executor, and where not. 307, &c.

K.

No Suit againſt the King. 65

Only for the King *an Action of Account againſt Executors.* 177

Debts to the King *of Records are to be firſt paid by Executors, and what are not Debts to the* King *of Record.* 190, &c.

L.

Land *how to be ſetled in a Mans life, that it paſs not by Will. ſo alſo of Leaſes.* 27, 28

Legatee, *when and how to recover his Legacy, and where to ſue for the ſame.* 39, &c. 318

How a Legacy may be diſpoſed by the Legatee, and where, and when. 40, 316, 317

Leaſe. *What a Leſſee may remove, and what not.* 86, 87

Law. *Where an Executor ſhall not be admitted to wage his Law.* 145

Where a Teſtator might wage his Law, Executor not chargeable. 169, &c.

Leaſe. *Where an Executor may wave a Leaſe, and where not.* 171, 172, 211, 215

Legacy, *how, where, and when recoverable by the Law.* 318

How a Legacy may be revoked. 350, &c.

Leaſe. *When and where a Leaſe ſhall be void.* 332

M.

Medietas Linguæ. *Where a Trial* per mediatat. ling. *is allowable, and where not.* 149, 299

N.

Ne unques *Executor, a good Plea.* 61

Nobleman *being Executor ſhall pay Coſts upon a Nonſuit.* 149.

O.

Overſeer *of a Will, his power and duty.* 13, 14
Outlawry, *what forfeited thereby, and what is not.* 23
Executor out-lawed doth not forfeit his Teſtators Goods, and why. 122, 152

P.

Proviſo *repugnant void.* 20
Probate. *What an Executor may do before the Will proved, and what not.* 48, &c.
Where an Executor may be ſued before the Probate of the Will, and where the ſame muſt be ſhewed, and where not. 51, 52
Before whom Probate of a Will is to be made. 62, 63, 68
Probate erroneous, where utterly void, and where not. 67, 68
What ſhall be ſaid to be a good Probate, and the validity thereof. 69
Probate and Refuſal, their relation. 70
Property. *Where the Property of the Teſtators Goods ſhall be turned to the Executor as his own.* 127, &c. 147
Poſſeſſion *of one Executor is the poſſeſſion of all, where, and when.* 142, 143
When and where an Executor ſhall be ſaid to have a Poſſeſſion to make him liable to pay Debts and Legacies. 154, &c.
Plea. *What ſhall be a good Plea for an Executor, and what not.* 210, 216, 221, 245, 248, 257,

Promiſes *made by the Teſtator, how and where to be conſidered, as to ſatisfaction by the Executor.* 223, 224

Proclamation *not to be made without Warrant from the King.* 231

Plea. *What ſhall be a good, and what a prejudicial Plea to Executors.* 263, &c.

R.

Revocation *of a Will, how to be performed, ſo as to make it null.* 29, &c.

Refuſal *to prove a Will, how it may or muſt be.* 53, 54

Where an Executor ſhall not be admitted to refuſal, and why. 55, &c.

Refuſal, how far it worketh, and for and againſt whom, and the force thereof. 59, 60

Replevin, *where, and in what it will not lie.* 82, 94

Releaſe. *One Executor cannot releaſe his Intereſt to the other; one is the Releaſe of all.* 141, 142 151, 321

Record. *Debts by Record, when, and how to be paid by Executors.* 169, 170

Recognizances, *how and when to be ſatisfied by Executors.* 200, &c.

Rent *due at the Teſtators death, how and when to be paid by the Executor.* 209, &c.

Releaſe: *when and how good by and from an Infant; and where not, and why.* 309, &c.

Remainder *upon Leaſes for years of what validity in Law.* 326, 327, 333

Who ſhall enjoy ſuch a Remainder. 328, &c.
What ſhall be ſaid a poſſibility of Remainder, and what Intereſt grows thereby. 341, &c.
Relation: *what it is.* 355
How the ſame is uſeful. 356, &c.

S.

Seal. *A Seal not neceſſary to a Will.* 43
Severance. *Where Executors ſue, ſuch as will not proſecute muſt be ſevered.* 140
Scire facias: *where not ſufficient for an Executor, and where it is.* 146, 147
Statute, *how to be ſued to Extent by an Executor.* 149
Specialty. *What ſhall be adjudged a good Debt by Specialty.* 167
Debts by Specialty, where to be paid by an Executor. 166,167,168,204
Scire facias: *where neceſſary, and where not.* 200,201,275
Statutes, *how and when to be ſatisfied by Executors.* 200, &c.
Socage. *Guardian in Socage how long to continue.* 303

T.

Teſtator. *What ſhall be ſaid to be a Teſtators Goods, and what not.* 72
Treſpaſs. *Where an Action of Treſpaſs will lie, and where not, and for whom.* 94,95.96,100
Treſpaſs. *Executor not liable for his Teſtators wrong, how, and where; and how, and where he is.* 182, &c.
Tithes: *of what payable, and of what not.* 97

Trover *and* Converſion, *where ſuch an Action is maintainable by an Executor.* 98

V.

Vaſtavit. *Where the Sheriff may return a* Vaſtavit. *and where not.* 241,&c.

W.

Will, *how relating to an Executor.* 3,4
What ſhall be adjudged a good Will. 4,5,6,10
Wills of two ſorts, and which is the beſt. 9,10
Will Nuncupative how to be made. 11
Two Wills where and when to be proved. 19
What and how many perſons may not make a Will, and who may. 20,21,22,24
How a Will, once revoked, may again be revived. 35,36
Waſte. *Who ſhall have an Action in Waſte, and where, and when.* 93,234,235,237,238
Waſte. *When, how, and where an Executor ſhall be ſaid to commit Waſte, and where not.* 226, &c.
Who ſhall be ſuable for ſuch Waſte, and how, and where. 231, &c.
Out of what ſuch Waſte ſhall be ſatisfied, and the remedy to attain the ſame. 236, &c.
Warranty *general, though by implied Covenant in every Demiſe, yet qualified by Covenant in words.* 181
Wrong. *Who is, and ſhall be ſaid, and Executor of his own wrong.* 246, &c.
How far ſuch becomes liable, and how, and to whom. 257, 258

How

How ſuch a one ſhall be ſued, and by what name. 254, &c.
What ſhall be ſaid to be well done by him. 259, &c.

Maxims.

Quod neceſſario ſubintelligitur, non deeſt. 7
Fruſtra fit per plura quod fieri poteſt per pauciora. ibid.
Factum valet quod fieri non debuit. 56
Quicquid plantatur ſolo, ſolo cedit. 83
Sol ſine homine generat herbam. 98
Pro poſſeſſore habetur qui dolo deſiit poſſidere. 160
Actio perſonalis moritur cum perſona. 182
Proximus quiſq; ſibi. 204
In æquali jure melior eſt conditio poſſidentis. ibid.
De minimis non curat Lex. 213
Ignorantia Juris non excuſat. 215
Poteſtas Regis juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed Diaboli. 222
Qui timent cavent, & vitant. 231
Fruſtra eſt inutilis potentia. 289
Volenti non fit injuria. 299
Non eſt regula quin fallat 302
Quando duo Jura concurrunt in una perſona, æquum eſt ut ſi eſſent in diverſis. 319
Nihil tam conſentaneum eſt æquitati naturali, quam unumquodq; diſſolvi eodem modo quo conficitur. 353

THE

THE OFFICE OF AN Executor.

THE INTRODUCTION.

THE things considerable touching Executors may all, in effect, be reduced to these three Heads; *viz.*

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the first I intend their Creation or Constitution, with the incidents there-

to. By the ſecond, their Intereſt, Fruition, or Poſſeſſion. By the third, their Managing and execution of their Office. This laſt was and is the thing principally in my intention, and the chief aim of this Diſcourſe; but neceſſarily it muſt have ſome *Ingredients*, ſome *Concomitants*, and ſome *Conſequents*: as he that travelleth from *London* to *York* to ſpeak with *J S*, muſt needs paſs by and through other Towns and Villages, and ſpeak with divers other perſons in his Journey and Return. To come firſt to the firſt; therein we will conſider theſe ſix things.

CHAP. I.

1. *WHether an Executor and a Will be ſuch Relatives, that one cannot be without the other; and therein of the ſeveral kinds of Wills.*
2. *How, and in what words an Executor may be made and created.*
3. *How he may be in ſpecial manner, different from the general, faſhioned, limited, or qualified.*
4. *Who may make, or be made an Executor, who not.*

5. *What one may give or bequeath by Will, what not.*
6. *How a Will or Executor once made may be unmade, and what ſhall amount thereto,* viz. *a Revocation total or partial; what to new publication.*

Of the Relation between a Will and an Executor.

AS to the firſt; the very name of *Executor* purporteth in general one to *execute* ſomewhat, or to whom the *execution* of ſomewhat is committed or recommended. In one particular thereof an Executor of a Will muſt needs be ſuch a one to whom the execution and performance of another Man's Will after his death is commended or committed; or who is conſtituted or authorized by the Will-maker to do him that friendly Office. Hence it followeth neceſſarily, that a Will is the only Bed where an Executor can be begotten or conceived; for where no Will is, there can be no Executor: and this is ſo conſpicuous and evident to every low capacity, that it needs no proof

or illuſtration. On the other ſide, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done; yet if no Executor be named, there is no Will: for theſe two be ſo relative and reciprocal, as that one cannot be without the other; if no Will, no Executor; if no Executor, no Will. Yet here are two Cautions to be affixed: 1. That a Man's Mind, Will and Intent touching the diſpoſition of his Goods being declared, although for want of naming an Executor he die Inteſtate, ſo as Adminiſtration is to be committed; yet for that here is not only an inchoation or inception of a Teſtament, but ſo far a progreſſion therein as *teſtatio mentis*, that is, the manifeſtation of the mind of the Party deceaſed, and owner of Goods, therefore this mind and intention of the Inteſtate being notified and made known to the Judge, who is to commit Adminiſtration, is uſually annexed (as I take it) to the Letters of Adminiſtration; and meet ſo to be, for a direction for and to the Adminiſtrator, as well as to the Will fully and perfectly made, but refuſed to be proved by the Executor, which is uſual.

Plow. Com. 185. In *Wood* and *Darcie's* Caſe, ſo expreſly ſaid.

Teſtamentum, quaſi teſtatio mentis.

Another

Another Caution is; Where a Man ſeiſed of Land in Fee-ſimple diſpoſeth the ſame, or part thereof, by his Will in writing, this ſtandeth good for the whole or part, according to the difference of the Tenure, although no Executor be named: ſo as the party dieth Inteſtate, and Adminiſtration is to be committed, as touching his Goods; and yet hath a Will, as touching his Lands. This may ſeem ſtrange: but the reaſon thereof is an Act of Parliament, inabling to diſpoſe of Land by Will in writing; and for that, Land is not properly Teſtamentary; neither hath the Executor (if any be) any thing to do or intermeddle therewith: and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this deviſe or diſpoſition of Lands by Will. So as, though where there is not *Teſtatio mentis*, there is not *Teſtamentum*; yet may there be the firſt without the later. Having now ſeen that Bequeſts of Legacies, without making of Executors, doth not amount to a Will; let us now conſider whether the ſole making of Executors, in the name of a Will, without giving any Legacy, or appointing any thing to be done by Executors,

whether, I ſay, this be or amount unto a Will or not; ſince here, upon the matter, nothing is willed, and conſequently nothing reſts to be executed by the Executors, whoſe office is, as hath been ſaid to execute the mind, will and intent of their Teſtator; and, *Ubi non eſt teſtatio mentis, non eſt Teſtamentum*, ſay the Canoniſts. For anſwer hereunto, confeſſing that indeed to be the Office of an Executor, I yet conceive confidently, that in the caſe above put there is a good Will, and as a Will it is to be proved, and approved, for theſe Reaſons. Firſt, for that the main and principal part of an Executors Office, and that which concerns the Soul of a Teſtator, (as our Books ſpeak) is the payment of his Debts: now who knows not that the very making of an Executor is the conſtituting of ſuch a perſon who is to pay all Debts? and for that cauſe and end is principally to have and enjoy all the Goods and Chattels of the Teſtators, and all ſums of Money to him owing. So as the naming of *A* and *B* Executors, is by implication a gift or donation unto them of all the Goods and Chattels, Credits and perſonal Eſtate of the Teſtator, and the laying upon them

Sum. Silv. fol. 32. b.

an

an Obligation to pay all his Debts, and making them ſubject to every Man's Action for the ſame. And if the Law ſpeak thus much, ſince *Quod neceſſario ſubintelligitur non deeſt*, what need then the party expreſs it in his Will? If he had willed more than this, as to have given this or that in way of Legacy, it had been needful for him ſo to have ſet down in his Will; but there is no meer neceſſity that every Man ſhould give Legacies in his Will: the Eſtates of many will not do more than pay their Debts, nor oftentimes do ſo much; ſo as if they ſhould give any Legacies, it muſt be a dead and a void Gift. And ſuppoſe a Man hath much more, and intendeth all to his Wife, Brother, or Siſter, or other Friend, his Debts being by ſuch perſons paid; ſince the very making of the party Executor without any more amounteth to thus much, and effecteth this, what needeth then more words? *Fruſtrà fit per plura quod fieri poteſt per pauciora*; as we often ſpeak touching Legal paſſages, It is needleſs to write four Lines, where two are ſufficient. Nor is *teſtatio mentis* here wanting, ſince the Teſtator hath made known who ſhall have the

Adminiſtration of his Goods for payment of his Debts: and it is to be preſumed he had no more ſpeciál Will, ſince he did not declare more, and left his Executors farther to have and to do *prout Lex poſtulat.* And who can ſay here is nothing to execute? Is the ſuing for and collecting of Debts due to the Teſtator, and paying of Debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum neceſſarium.* Beſides the making of an Executor is a deſignment of a perſon to be the Teſtator's Aſſign, to whom and by whom divers things may be feaſible by virtue of Covenants, Bonds, or other Aſſurances; as after, where we come to ſhew how the Executor repreſents the perſon of the Teſtator, will appear: alſo of one who, as our Books often ſpeak, is to diſpoſe the Teſtator's Goods for the beſt advantage of his Soul; but inſtead of that, (ſince as the Tree falleth ſo will it lie or reſt) I will ſay as is moſt for the honour and reputation of the Teſtator.

Of the kinds of Wills.

NOw Wills are of two kinds, or may be two ways made, *viz.* either by writing, or nuncupative, that is, by words not put in writing during the Teſtator's life; for after the Teſtator's death this verbal Will muſt be reduced to writing, and have the Seal of the Ordinary, or Judge Spiritual, thereto affixed: and then it is as effectual, and of as good validity, as if it had been in writing in the Teſtator's life-time; and ſo doth the Common Law allow and approve thereof.

4 *Hen.*6.10. *b.* 4. 1. If it be written, and brought to and approved by the Teſtator in his life, it is a Will in writing.

14 *H.* 6. 5. *Vide* 5 *H.* 5. 1 *M.* 15. and 16 *Eliz.*

But I adviſe all to make Wills by writing, and not to leave them to the doubtful fidelity or ſlippery memory of Witneſſes. For as of Leaſes parol hath been ſaid, that they be Leaſes perjured, or of perjury: ſo of Wills parol may be feared. Beſides, many times a Man doth ſpeak and declare this or that part of his Will, which his Wife, Child, or Friend diſſwading, he letteth that purpoſe and part of his Will to fall, and departs from it; yet Witneſſes, wiſhing it to ſtand, will perhaps affirm it as part of the Will. As for a Will-gift, and diſpoſition of Land of inheritance, if it be not fully written

written before the death of the Teſtator, or done ſo far (at leaſt) as concerns the diſpoſition of Lands, it cannot be for that part made good by reducing it to writing after his death. As for Goods and Chattels, it may. Yet if it be written before the death of the Teſtator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for Land, as the Caſe reſolved in King *Edw.* 6. his time was, but alſo for Goods and Chattels, ſo as there be an Executor named. But whether ſhall we ſay this is a Will nuncupative, or in writing? And ſurely I think that this is a Will in Writing, and not only verbal, though it want ſubſcribing: for we know that many cannot write their Names, but only Marks, and what is that? Nay, ſuppoſe one wants Hands, and cannot write ſo much as his Name; yet doubtleſs this Man may make a Will in writing, it being written by his direction, as his Will which he dictated: nor is the ſubſcribing of the Name of the Maker any eſſential part of a Deed, and leſs of a Will, which needs not ſealing, as a Deed doth. Now put we the caſe, on the other ſide, that many Bequeſts or Legacies be named

6 Ed. 6. Dy. 32.

named in a Will, and many things expreſſed to be done, and no Executor is named in the Writing, only by word of mouth *A* and *B* be named Executors: This I think confidently is no Will in Writing, but nuncupative only; for that one eſſential part of the Will, *viz.* making of Executors, is wanting in the Writing. Nay, the appointing of him Executor who is named in a Note left with *A B*, is no ſufficient making of an Executor, ſaith the *Summiſt*. And of ſuch nuncupative Wills Mr. *Perkins* reaſonably ſaith, that it properly hath place when one, ſuddenly taken with ſickneſs violent, dares not ſtay the writing of his Will, for fear of prevention by death; and therefore prays his Curate and others to witneſs what his Will is. To this Will not written there muſt be ſeven Witneſſes, and ſuch as come not by chance, but are eſpecially called for that purpoſe, ſaith the *Summiſt*.

Tit. de Teſt. Sum. Silv. f. 443. b. If he ſurvive and live a long time, not cauſing it to be writ or atteſted by Witneſſes, methinks it ſhould not ſtand as his Will. *Id. ſupra fol.* 444. b.

What ſhall amount to a making one Executor, or what words are requiſite thereunto.

HAving before made to appear, that the being of an Executor is an eſſential

ſential part of a Will, and ſo *de eſſe*, and not *de bene eſſe* only, of a Will and Teſtament: let us now ſee, firſt, by what words an Executor may be made; ſecondly, *de modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the firſt, though one do expreſly by Will name or appoint any to be Executor; yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an Executor, it amounteth to as much as the ordaining or conſtituting of him or them to be Executors: As if he declare by his Will that *A B* ſhall have his Goods after his death to pay his Debts, and otherwiſe to diſpoſe at his pleaſure, or to that effect; by this is *A B* made Executor, as was conceived by the Judges in the late Queen's time. And long before that it was held, That if one do will only that *A B* ſhall have the Adminiſtration of Goods, he is thereby made Executor, yea, in the ſaid late Queen's time, one giving divers Legacies, and then appointing that his Debts and Legacies being paid, his Wife ſhould have the reſidue of his Goods, ſo that ſhe put

If *A B* be made Executor, and to him and *D* ſome Goods are deviſed to be diſpoſed for his Soul, *D* is by this an Executor for theſe. 39 *H.* 6. *Dyer* 90. *M.* 15 & 16 *Eliz.* 21 *H.* 6. 6, 7.

put in ſecurity for the performance of his Will; by this, without more, was ſhe an Executor, as was held by three Juſtices, (*viz.*) *Manwood*, *Harper* and *Mounſon*, in the Lord *Dyer*'s abſence. And ſo alſo where an Infant was made Executor, and *A* and *B* Overſeers, with this Condition, That they ſhould have the rule and diſpoſition of his Goods, and payment and receit of Debts, unto the full age of the Infant; by this were they held to be Executors in the mean time. And if *A* be made Executor, and the Teſtator after in his Will expreſſeth that *B* ſhall Adminiſter alſo with him, and in aid of him; here *B* is an Executor as well as *A*, and if *A* refuſe, *B* alone may prove the Will as Executor, notwithſtanding it be only ſaid, he ſhall Adminiſter with *A*, and in aid of him. Thus many ways, and by divers words of implication, one may be made Executor, although not expreſſly ſo named by the Will. But if *A* be made an Executor, and *B* a Co-adjutor, without more, he is not by this an Executor with *A*, as in K. *H.* 6. his time was held: nor hath ſuch Co-adjutor or Overſeer any power to Adminiſter, or intermeddle otherwiſe than to counſel, perſwade, and adviſe; yet

21 H. 6. 6. 24 Ed. 3. F. Exec. 121. 29 Ed. 3. 39.

yet I think he may, and in Conſcience ſhould ſo do. And if that will not prevail to rectifie negligence or miſcarryings in Executors, he ſhall well perform the truſt repoſed in him, if he complain in the Spiritual Court, or Court of Conſcience: and it is reaſon, I think, that ſo doing upon juſt cauſe, his charges be born out of the Teſtator's Eſtate, or the Executor's Purſe, who otherwiſe would not be reformed.

How an Executor, or his Executorſhip may be limited or qualified in ſpecial manner, different from the general.

NOw let us ſee how this making of an Executor may be ſpecially qualified. And firſt, the time may be limited when he ſhall firſt begin to be Executor; and that either certainly, or with ſome contingency. Secondly, the creation may be conditional. Thirdly, it may be partial, or dividedly, and not intirely.

As to the firſt, one may appoint *J S* to be his Executor a year or more time after his death; this is good. So alſo

alſo if *A* appoint *B* his Son to be his Executor when he ſhall come to full age, and in the mean time he dieth Inteſtate. Again, one may appoint the Executor of *A* to be his Executor: and then if he die before *A*, he is Inteſtate until *A* die. This creation may alſo be conditional, and the condition may either be precedent or ſubſequent. In the time of King *H. 6.* one did name *A* and *B* his Executors, and if they would not take it upon them, then *C* and *D* ſhould be his Executors, and then there *A* and *B* refuſed, and the queſtion was, whether in Suit againſt the Debtors of the Teſtator, *A* and *B* ſhould joyn with *C* and *D*; as where four Executors be named, and two refuſe, and the other two prove the Will, yet all four muſt be named in Suit againſt the Teſtator's Debtors, as was there admitted: but in the principal Caſe it was reſolved, That the Suit ſhould be only in the name of *C* and *D*, for that the appointment of them Executors if *A* and *B* did refuſe, did imply that then they only ſhould be Executors; and here all four were never made, nor intended to be Executors, but *A* and *B*, upon a condition ſubſequent

Vide Groſbrook & Fox. *Plowd.* *A* and *B* made Executors, but not *B* to intermeddle during the life of *A*; and good. 32 *H.* 8. *Bro.* 155. 3 *H.* 6. *fo.* 6.

ſequent, that they ſhould not refuſe; and *C* and *D*, upon a condition precedent, *viz.* if *A* and *B* did refuſe. It is uſual to make one or more Executors conditionally, that they put in ſecurity to pay Legacies, or, in general to perform the Will; nor was it ever doubted, as I think, but that this was good: yet I ſhould adviſe that ſuch Condition be plainly thus expreſſed, *viz.* either thus, that if *J S* do put in ſecurity, *&c.* by ſuch a day, then he ſhall be Executor, elſe not; or thus, *viz.* to make him Executor conditionally, that before he do Adminiſter (Funeral perhaps excepted) he ſhall put in ſuch ſecurity; elſe, perhaps, he being Executor till the Condition broken, in that mean time he may have diſpoſed of all or moſt part of the Teſtator's Eſtate. In the late Queen's time there was a Caſe remarkable to this purpoſe: One Willed, that if his Wife ſuffered *J S* to enjoy *Black-Acre* (being belike part of a Joynture) for three years, then ſhe ſhould be his Executor, or elſe *A B* ſhould: and the queſtion was in the *Common Pleas*, Whether preſently, before the end of the three years, ſhe were Executor; or not till ſhe ſuffered the

P. 33 *Eliz. Alice Franciſ* her Caſe.

the Land to be enjoyed three years; and it was held by all the Judges but the Lord *Anderſon*, that ſhe was preſently Executor, until ſhe ſhould diſturb *I S*, *&c.* For upon that done, it was agreed that the Executorſhip would by virtue of the Condition be transferred from the Wife to *A B*. But now during theſe three years might ſhe have diſpoſed of all the Goods of her Husband, yea, within one of theſe three years, and leſs time, and then have broken the Condition, and have left to *A B* a dry Executorſhip.

Now to the third Point, One may divide his Executor's power three ways, *viz.* Really, Locally, or Temporally. Really thus: He may make *A* his Executor for his Plate and Houſhold-ſtuff, *B* for his Sheep and Cattel, *C* for his Leaſes and Eſtates by extent, *D* for his Debts due unto him; and ſo divide the Power and Adminiſtration of his Executors at his pleaſure. He may divide them alſo or their power Locally: *viz.* *A* for his Goods in *Com. Buck.* *B* for thoſe in *Com. Ox.* and *C* for theſe in *Com. Berks.* He may alſo divide them in Time: *viz.* his Wife or any other perſon to be Executor during her life, or during the mi-

19 H.8.3. 19 H.8. *Dy.* 4 *Hil.* 33. *Eliz. in com. banc.*

32 H.8. *Bro.* 115.

nority of his Son, or ſo long as ſhe continues Widow, and after his Son to be Executor. So of like limitations or diviſions, either for time, place, or things, wherewith they ſhall intermeddle. Nay doubtleſs one may be made Executor for one particular thing only, as touching ſuch a Statute, or Bond and no more; and thereof good uſe may be made, as I think, thus. Many have Bonds, Stautes and Recognizances, for warranty or enjoying of Land, or freeing, or ſaving harmleſs from imcumbrances, in general or particular. Now he which hath theſe, ſelling the Land, may by Letter of Attorney lawfully aſſign them to the party who buyeth the Land or Leaſe: but this notwithſtanding, the intereſt remains in him who ſelleth, and by his Outlawry they may be forfeited, or by him releaſed, any Bond to the contrary notwithſtanding; and if he die, the intereſt in Law will be in and go to his Executors, and in their names only Suit or Execution may be had and maintained.

Quer. If not *Aſſets* in Law, when obtained.

Now then if the Vendor, beſides aſſignment, make as to the Statute, Recognizance, or Obligation, only the Vendee Executor: by this the intereſt after death

death of the party, will be in him actually and really to his more ſafety, ſince none but he can releaſe or diſcharge, nor any other name need to be uſed to ſue, or take benefit thereof. But *Quær.* if the Vendee, his Heirs and Aſſigns, may be made Executors, ſo as that ſecurity ſhall go to them one after another, without renewed making of Executors? Thus if the party make no other Executor, he dieth Inteſtate as to the reſt of his Eſtate; and as to this ſpecialty only ſhall have an Executor, and muſt have a Will proved: And in caſe he doth make another Will for his Eſtate reſidue, there muſt be two Wills proved. But in the other caſe, where by one only Will one is Executor for one part of the Eſtate; and another for another, there being but one Will to be proved, one proving of it ſufficeth. And though in the Premiſſes of a Will two be made Executors joyntly and equally; yet there may be a *Proviſo*, that one ſhall not meddle during the others life, ſo as they ſhall be Executors ſucceſſively, and not joyntly. And thus alſo to other purpoſes aforeſaid, a ſubſequent Clauſe or *Proviſo* may make the partition and diviſion of authority. But if the *Proviſo* or

32 H. 8. Bro. Exec. 55.

Clauſe ſubſequent be meerly contrary to the Premiſſes, it will be void: as where two were made Executors with a *Proviſo* or Clauſe, that one of them ſhould not Adminiſter his Goods; this was held void for repugnancy by *Brudenel* and *Englefield* Juſtices. But *Fitzherbert* Juſtice was of mind that it was not void, nor utterly repugnant: for the other might joyn in Suits, though not adminiſter. And Juſtice *Shelley* was of a third opinion different from all the reſt, *viz.* That here was a repugnancy, but the laſt Clauſe ſhould control the Premiſſes: and ſo this one only ſhould be Executor.

19H.8 *Dyer* 3, 4.

Who may make an Executor.

SOme perſons may be unable to make Wills, and conſequently Executors, for that is all one: whoſoever may make a Will, may make an Executor. There be nineteen ſeveral kinds of perſons unable, as the *Canoniſts* ſay to make Wills; but with many of them we will not intermeddle, becauſe we find no mention of them in our Law. The perſons principally and moſt uſefully to be conſider'd of by us are either the defective in underſtanding, as

as Infants, Idiots, Lunaticks, and the like; or defective in power or Intereſt, as Women covert or married, perſons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as Aliens, Corporations, Villains, Monks and Friers. As for Infants and Women covert, becauſe much is to be ſaid of each of them and their Adminiſtration, we will forbear to treat of them in this place, but after will do it of each ſeverally.

To begin with an Idiot; naturally he is not able to make a Will, as was reſolved in the Spiritual Court, becauſe he wants the uſe of Reaſon to conceive what it is fit for him to will: nor doth the Common Law oppoſe this, as I think. 3 *Eliz. Dyer* 203, 204.

A Lunatick having *Lucida intervalla*, that is, ſome ſeaſons of enjoying his right mind, and freedom from his Lunacy, may in thoſe times of his right mind make a Will and Executors, elſe not; for even one by Age or Sickneſs become of *non ſanæ memoriæ* is unable to diſpoſe of Lands or Goods.

One deaf and dumb born may make a Grant, ſaith Mr. *Perk*. If he hath underſtanding, which is hard, as he confeſſeth, conſequently much more a Will; but *Vide plus in Perk* 5, 6. 33 *H.* 8. *Dyer* 55, 56. *Vide* 26 *Ed.* 363. *Lib. Intr.* 396.

18 *Ed.* 5. 53. 26 *Ed.* 3 63. So in effect 44 *Aſſ.* p. 30. *P.* 31 *Eliz. Poſcuits de Fountains* Caſe.

but in the time of King *Hen.* 1. it is left a Demurrer, whether a Deed by ſuch be good or not. If but mute, he may wage his Law, and atturn by ſigns, and ſo perhaps by ſigns declare his Will, 44 *Aſſ. p.* 36.

An Alien may make or be an Executor, ſo as he be not an Alien enemy, for ſuch cannot ſue, as in the late Queens time was held: but there the doubt was, whether a Subject of *Spain* were at that time to be held an Enemy, no War being proclaimed between the Kingdoms, though hoſtility exerciſed.

As for perſons Attainted, Convicted, or Outlawed, it will be ſaid, that theſe can have no Goods of their own, and conſequently they can make no Wills, nor Executors; and it is not to be denied, that we find it pleaded ſometimes by Executors, that their Teſtators ſtood out-lawed. But firſt it is clear, that all and every of theſe may have Goods as Executors to others, which neither are forfeited by Attainder or Outlawry, nor deveſted by Marriage or Villainage. Therefore, as touching them, they may make Teſtaments. And that all theſe ſorts of perſons may be Executors, is alſo evident.

So

So alſo touching Villains, Monks, and Friers, who can have no Goods to their own uſes. And that one attainted of Felony may have an Executor, appears by the Caſe in the late Queens time wherein it was long debated, Whether ſuch an Executor might maintain a Writ of Error, or not, to reverſe the Attainder of the Teſtator. And as for other Out-lawries, the Plea thereof by the Executors, that their Teſtator was and died out-lawed, proves not a nullity of the Will, or Executorſhip; for then they might have pleaded, that they were never Executors. But it tends to this, that no Goods did or could come to them for ſatisfaction of the Debts, by reaſon of Out-lawry; yet it hath been delivered, not of old only in many Books, but by ſome of late, that Debts upon Contract, where the Defendant may wage his Law, are not forfeited by Out-lawry, nor uncertain Damages for Treſpaſs in Battery, or falſe Impriſonment, *&c. Quær.* of breach of Covenant. But Goods taken away by a Treſpaſſer, may yet be forfeited by the Attainder or Outlawry of him from whom they are taken; for that the property in right ſtill appertained

29 *Aſſ.* p. 63.
49 *Ed.* 3. 5.
50 *Aſſ.* p. 15.
33 *H.* 6 27.
9 *Eliz. D.* 26. 2. *Contra*, Co. *lib.* 4. *fol.* 95.
19 *H.* 6. 47.
30 *Ed.* 3. 4.
16 *Ed.* 4 7.
5 *Ed* 3. 53.
6 *H.* 7.

ed to him, and he might have taken them again whereſoever he found them: therefore the Action for this ſhall not come to his Executor, but for the other not forfeited it may.

15 H.7.fo.7. Whether an excommunicated perſon be able to make a Will or not, may be ſome doubt, ſince *Keble* denieth him ability to preſent to a Church; and in the very point anciently the opinion of *Canoniſts* hath been negative, but more lately grew affirmative.

Sum. Sylv. tit. Teſtam.

Who may be Executor, more.

42 E.3.1. AN Excommunicate Perſon cannot ſue, that is, proceed in Suit as Executor, till he be abſolved, there being danger of Excommunication to all that converſe with him; but this makes not a nullity of his Executorſhip, nor overthrows the Suit, but ſtays it only from proceeding until abſolution. As for perſons attainted or outlawed, we have before ſpoken affirmatively in way of proof that they may make Executors, for continuation of the Executorſhip, ſo of Aliens and others before. Recuſants convicted at the time of the death of any Teſtator

21 H.6.30. A Clark attaint may be an Executor by Paſt. *Juſt. Paſcat. de Fountain.*

But an Alien Enemy cannot ſue as Executor. *P.* 31 *Eliz.* 3 *Jac cap.*5.

Teſtator are diſabled to be his Executors.

Whether Corporations compound, or conſiſting of divers perſons, may be made Executors or not, I doubt. Firſt, becauſe they cannot be Feoffees in truſt to others uſe. Secondly, they are a body framed for a ſpecial purpoſe. Thirdly, they cannot come to prove a Will, or at leaſt to take an Oath as others do.

What a Man may give or diſpoſe by his Will.

HAving conſidered of the makers of Executors by Will, and of them ſo made; let us now conſider what by this Will may be diſpoſed, given or bequeathed. And firſt, he who himſelf is an Executor cannot by his Will give or bequeath to any other the Goods, Chattels, or Credits he hath as Executor, the property not being altered; for that he hath not them properly as his own, or to his own uſe; only he may make a continuation of the Executorſhip, and his Executor ſhall have them as Executor to the firſt Teſtator, as was reſolved by the Judges of both Benches in the late Queen's time. And if he be Adminiſtrator, the Bequeſt is then alſo void; nor then

Bramby verſ. Grantham. Plowd. Com. f. 525.

Hil. 26 Eliz.

then will they go to his Executor, but to a new Adminiſtrator; but on his Death-bed he may give them by Word or Deed, though not by Will. Next, if a Man have Debts owing to him, as many have much, it is conſiderable, whether by way of Bequeſt in his Will he can give away theſe to any from his Executors. And doubtleſs he cannot effectually in Law; they being not ſubject to Aſſignment unto any, except the King. So as if he give ſuch a Debt to *A*, and ſuch to *B*, yet muſt the Suit for them be in the name of the Executor; and ſo alſo the Releaſe or Acquittance for them; and not in their names to whom the Bequeſt is. But when they be received, if there be no Debts to pay, the Executor ought to deliver them to the party to whom the Bequeſt is, and thereunto may be compelled in Court of Conſcience, or in the Spiritual Court. Therefore the Caſe of the bequeathing Money payable upon a Mortgage is in this manner to be underſtood to be good, and not otherwiſe, as I take it. He that is joyntly with any other eſtated in Lands or Goods, can give no part by his Will, but all will ſurvive: but by Act in his life he may diſpoſe

At any time in his life he may alter the property.

So 48 E.3. *fol.* 14, 15. Where the Bequeſt was to one of the Executors, it was held that the other Executor might releaſe it. If ſufficient, otherwiſe to pay all one as if none. 48 E.3. *p.* 14, 15. 11 *Ed.* 3. Fitz. *Tit. Cond.* 9. where both ſtated jointly by one Grant.

Differences between Joint Tenants and Tenants in Common, holding by ſeveral Grants.

diſpoſe of his part; and the Aſſignee may diſpoſe of his moiety by Will, yea, though it be half an Horſe or Ox, that cannot be divided. So of a Leaſe of Lands, or Tithes, or Grant of Goods to two, *Habendum*, one moiety to the one, and the other moiety to the other; each may give his moiety by Will. But if one be poſſeſſed or eſtated for years, by Leaſe, Wardſhip, or Extent, *&c.* in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of theſe; but, notwithſtanding, they will remain unto his Wife, upon his death: but yet his Gift or Grant of them taking effect in his life-time would bind his Wife, and carry away his intereſt from her. If one be Tenant for the lives of one or more others, (as oft-times Men take Leaſes for lives of younger perſons than themſelves) this cannot be by Will diſpoſed of; for that it is no Chattel, nor is it within the Statutes of Wills, for that is no ſtate of Inheritance. Therefore let the party look to convey it in his life-time, leſt it go to an Occupant, *viz.* him who firſt ſhall enter. If it be an Eſtate in Land, he muſt either make Livery, have a Bargain and

Another kind of Tenants in Commod.

and Sale enrolled, or Covenant to ſtand ſeiſed to the uſe of his Wife or ſome of his Blood, or make a Leaſe for years determinable upon thoſe lives. Good it be by bargain and ſale for years, if the thing be in Leaſe, that ſo without Inrollment or Atturnment the Rent may paſs: elſe a bargain and ſale may be made for a Month, or ſuch like time, and then a Releaſe or Grant of the Reverſion in ſtead of Livery and Seiſin. But if a Man have a Leaſe for never ſo many years, determinable upon life or lives, that is, if ſuch or ſuch live ſo long, (which unskilfulled perſons call a Leaſe for lives) this State may well enough be given and diſpoſed by Will, becauſe it is but a Chattel. If a Man be ſeized in Fee or in Tail of Land having Corn growing upon it, and by his Will do give the Corn, and die before ſeverance, this is a good Bequeſt; becauſe the Corn ſhould have gone to the Executor. So it is alſo of a Parſon touching his Glebe, and a Man ſeized in the right of his Wife, or his own right but for life. But as for Trees growing upon the Ground, theſe can no otherwiſe be given by Will, than as the Land it ſelf upon which they grow may be given; of which matter, as not pertaining to the Office

Stat. Merton. &c. 2. Viduæ poſſunt legare tam de ritibus quã de aliis, &c. Quær. If the trees may [illegible] de[illegible]ſed [illegible] Stat. [illegible] gi[illegible] Land it ſelf.

Office of Executors, *viz.* how and in what manner Lands may be given by Will, I intend not to treat in these Discourses.

Of the Revocation and Countermand of Wills, and new Publication.

HAving considered of the making of Wills and Executors, let us, before we come to the Probate, consider of Revocation; for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz. Inception*, which is the making, and *Consummation*, which is the Death of the Testator or maker of the Will, there is power in him at any time before death to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications or Re-affirmance of Wills, in whole or in part. As therefore a Will may be made by word, so also may a Will made in Writing be by word revoked or disannulled: for since every making of a later Will is a Countermand and suppression of the former Will; and since a Will may be made Nuncupatively or by word, and so

Omne testamentum morte consummatur. See the pleading of it by making a later Will. *Lib. Intrat. f.* 323. *b.* & 641. *a.*

ſo by making a verbal Will one may revoke a written Will: it will thereupon follow, that one by word may expreſs the alteration of his Mind thus far, that the Will by him formerly made ſhall not ſtand, but be revoked and annulled; and this will ſtand and be effectual; ſo as if he after die, without making any new Will, or new Publication, or Re-affirmance of the former, he dieth Inteſtate, or without Will. As a Will may be wholly revoked, ſo alſo in part. Hereabout a good reſolution was in a *Kentiſh* Caſe, where one *Ryete* by his Will in writing did give ſome Gavel-kind Land to one *Harriſon*, and five days before his death, ſaid, in the preſence of Witneſſes, that this Gift ſhould not ſtand, and that he would alter it when he came home; deſiring them to bear witneſs of his Revocation. Now before he came home, he was killed by the ſaid *Harriſon*, who cauſed the Will in writing to be proved, and after he was attainted and hanged for the Murther, and his Son by the Cuſtom of *Kent*, (*viz.* the Father to the Bough, and the Son to the Plough) entred into the Land. And this manner of Revocation by word only

14 Eliz. Dyer 310. b.

only was held ſufficient, although the Will in writing were not cancelled, nor defaced. And the like Reſolution, for verbal Revocation, is implied in the Caſe of *Forſe* and *Hembling*; where it being reſolved, that a Feme Covert, or married Woman, by word countermanding and revoking her Will formerly made, when ſhe was a Sole or unmarried Woman, this was not effectual, nor of force by reaſon of her Coverture taking away the freedom of her Will. Hereby it is implied, that another who hath freedom of Will may by word ſufficiently revoke a Will in writing; and ſo was it ſince alſo admitted in the Caſe between Sir *Edward Mountague* and *Jeoffries*, touching the Will of Sir *Jo. Jeofferies*: but there a difference was conceived betwixt ſaying, *I will revoke my Will*, (which only expreſſed a purpoſe or intent, and therefore was no preſent Revocation) and ſaying, *I do revoke it*, or, *It ſhall not ſtand*, or *My Heir ſhall have my Land*; which croſſed the gift of it by the Will. And as Wills may be wholly or in part revoked; ſo may alſo the Executorſhip of one or more of the Executors, and yet the Will may ſtand in all the other parts.

M.28 & 29 Eliz. Co. lib. 4. fol. 60.

7 H.6 fo.13. M.38,39. Eliz.

parts, ſo as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, becauſe no Will can ſtand without Executors: and this Revocation may be by word only, without being expreſſed in the Will, or any other Writing. But I could wiſh all to expreſs ſuch Revocation in the foot of the Will, or that the name or names of the Executor or Executors ſo revoked be expunged or blotted out of the Will; and that this be done in the preſence of ſome Witneſſes to teſtifie the act and intent of the Teſtator.

Again, Revocations may be by act in Law as well as in fact, or by direct and expreſs terms: as in the ſaid Caſe of *Mountague* and *Jeoffries*, where Land being deviſed by Will, and the Deviſor after making a Feoffment, though there were ſome defect in the Livery to make it effectual; or if he made a Bargain and ſale that was never inrolled, or granted the Reverſion, but no Attornment had, ſo as the Land paſſed not, yet in all theſe Caſes the Will or Gift of Land ſtood revoked. But in caſe he had only covenanted that he would have made ſuch an Eſtate, and not done it; this was held

Vide 6 E. 6. *Dyer* 74. & 3. & 47. & *Ma.* 42. 2.

to

to be no Revocation. And ſo by ſome, in caſe he do but make a Leaſe, leaving the Fee-ſimple as it was: But of this *Quære*; And if a difference may not be betwixt making a Leaſe for years and a Leaſe for life, which altereth the Freehold. If a Leaſe for twenty years be bequeathed to *J S*, and after the Teſtator maketh a Leaſe for fifteen years, reſerving a Rent; I take this to be no Revocation of the Bequeſt; but if the Teſtator, after this Will made, take a new Leaſe for a longer term, ſo as the former Leaſe is ſurrendred in Fact, or in Law; this muſt needs be a Revocation of the Bequeſt, or at leaſt an Adnullation thereof; and that although the Bequeſt were generally of his Leaſe, not mentioning the number of years; for this which he now hath is another Leaſe, and not that which he had at the time of the making of the Will. So if one give his black Gelding by Will, and after, before his death, he ſelleth or giveth away that Horſe, and buyeth another black one; this new-gotten Horſe ſhall not paſs by the Will, becauſe it was not the Teſtator's at the time of making his Will. So alſo if the Crop in the Barn be bequea-

thed in *October*, and the party lives till that time twelve month, having ſold that Crop, and inned a new; this later Crop ſhall not paſs by the Will, and the former cannot.

Again, as Revocatian may be by Alteration of the ſtate of the Deviſor in the Land deviſed; ſo may it alſo be by Alteration in ſome Caſe, of the ſtate or quality of the perſon of the Deviſor. As if a Woman ſole make a Will, and after take a Husband, this, without any more, as is reſolved in the ſaid Caſe of *Forſe* and *Hembling*, doth work a Revocation or Adnullation of the Will; for that elſe it ſhould be irrecoverable, ſince ſhe, having loſt the freedom of her Will, cannot actually and directly make a Revocation, as we before have ſhewed. But notwithſtanding her Will be revoked; yet in caſe her Husband before or after Marriage with her were bound or covenanted to perform this Woman's Will, if he ſo do not, by payment of the Legacies therein bequeathed, his Bond or Covenant will ſtand good, and be ſuable againſt him: as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*, who firſt was bound to perform it. Yet another Caſe there

M. 25, 26 *Eliz.*

there is of Alteration in the ſtate of the Teſtator's perſon which makes no Revocation of his Will; as if he being of ſound mind and ability make a Will, and after becometh Frantick. In this caſe this is no Revocation; ſo as his Will ſtands till his death irrevocable, if he recover not. Now of a Will revoked there may be a Reviver by a new Publication; and thereof now.

Of new Publications.

HAving ſhewed how a Will may be revoked, and ſo loſe its force; let us now ſee how, without making a new Will, that ſo revoked may be revived and ſet on foot again. And that is divers ways. As firſt, by a *Codicil* annexed after thereunto; as was reſolved between *Betford* and *Barnecot* in the *King's Bench*. Secondly, by adding any thing to the Will, or making a new Executor. Thirdly, by expreſs ſpeech or word that it ſhould ſtand, or be his Will: as I conceive to have been the better Opinion in the ſaid Caſe of *Mountague* and *Jeoffries*, wherein yet was much difference of Opinion, both touching *M.* 38. 29 *Eliz. in Ba. Reg.*

Revocation, and new Publication. If a Man having made a former Will, do make a later, which is more than a bare Revocation; yet if afterward, lying upon his Death-bed and ſpeechleſs, both theſe Wills be delivered into his hand, and he required to deliver to one of his Friends about him that Will which he would have to ſtand, and to keep in his hand the other, and he thereupon delivereth to the Miniſter, or other his Neighbours, the firſt made Will, retaining in his hand the later, as was done in the time of *Edward* the Third; here the former Will, though made void many years before by the later, is revived, and ſhall ſtand as the partie's Will. But now put the caſe that a Bequeſt at the firſt is void; yet by Publication after it may be good: as if one give to *Sarah* his Wife a piece of Plate, or other thing, and hath no ſuch Wife at the time, but after marrieth one of that name, and then publiſheth his Will again; now this ſhall be a good Bequeſt. So if one deviſe Lands or Goods which one hath not; if he after do purchaſe the ſame, and then ſay, that his Will before made ſhall ſtand, or be his Will, it ſhall be

44 Aſſ. p. 36.

44 Ed. 3 fol. 33.

be a good Will and Bequeſt; for this in effect, is a new making. And though moſt of the precedent Caſes be of Revocation of particular parts of the Will, and not of the total; yet firſt, be it conſidered, that that part ſo revoked was in effect, the ſubſtance of the Will; next, it is eaſily diſcerned, that if one part be revocable, ſo is another alſo. And thus Revocation may ſpread it ſelf over the whole: Nay, doubtleſs the whole *uno flatu* may be revoked, as well as by parts; even as a Faggot may be put wholly into the Fire, as well as ſtick by ſtick. And as the *Velleities* or diſpoſing parts of the Will are revocable and revivable by new Publication, as aforeſaid; ſo is alſo the conſtitution of Executors. As if one of the Executors names be ſtriken out, and afterwards a *Stet* be written over his Head by the Teſtator or by his appointment, now is he a revived Executor. So if the Teſtator expreſs by word, in the preſence of Witneſſes, that the party put out ſhall yet be Executor. But now I mean where the Executor's name is not ſo blotted out but that it may be read and diſcerned;

3 & 4 P. & M. Dy. 143.

for elſe the *Stet* is upon nothing: and if the verbal Re-affirmance ſhould renew his Executorſhip, then muſt the Will be partly in writing and partly Nuncupative, his name not being to be found in the written Will.

CHAP. II.

Of the ſtate of things inſtantly upon the Teſtator's death, before any Will be proved.

Here we will conſider theſe ſeveral things.

1. *What is wrought by a gift of a thing certain and known, as the White Horſe, the Red Cow, &c.*
2. *What by a Bequeſt to an Executor.*
3. *What wrought by a releaſe in the Will to a Debtor.*
4. *What by making a Debtor or Creditor an Executor.*

AS touching the firſt, *viz.* the Bequeſt of a Chattel, real or perſonal, which the

the Teſtator had in poſſeſſion: notwithſtanding that, if the ſaid Teſtator had by his Deed or Writing, or but by word on his Death-bed, or before given theſe his Goods, and died before they had been taken, he to whom they ſo were given might have taken them; yet in this caſe of Gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them or recover them from the Executor, or a ſtranger take them by any Suit at the Law, for that he hath no property in them; yea, if the Bequeſt be to himſelf who is made Executor, be it of a Leaſe, Plate, Cattel, *&c.* they ſhall not veſt nor ſettle in him as Legatee, but as Executor, until expreſs or implied election; but he is to have and take the ſame by way of Legacy. And the reaſon in both Caſes is this, *viz.* That the Law prefers Debts and the ſatisfaction of them before Legacies, and ties Executors alſo to that rule; and therefore will transfer nothing from or out of the Executor, till he having conſidered of the ſtate of the Debts to be paid, and Goods out of which the ſame are to be paid, ſhall find that ſafely this or that Legacy may take effect without making any deſect in payment of Debts, or drawing

1 & 2 P. & M. D. 110. a & 139. b. Vin. Co. 8. f. 95 & 96.

Of the Second, ſee Co. 10. f. 47. 652.

So reſolved Paſ. T. 37 El. in B. R. only Gawen contra Portman 1 l. & Sime. Def. See more of this Tit. Legacy; and of the aſſent of one Executor only.

upon him and his own Goods any damage or loſs, as a Waſter, and thereupon ſhall aſſent to ſuch Legacy. Thus now is the Law taken; but heretofore ſome Opinion hath run otherwiſe, *viz.* That he to whom any Bequeſt was made of a thing known and certain, might take it without any aſſent of the Executor; and that when to the Executor himſelf any Goods or Cattel, movable or immovable, were bequeathed, in caſe there were otherwiſe ſufficient Goods for ſatisfaction of Debts, the ſame ſhould inſtantly upon the Teſtator's death, without any act or election by the Executor, be transferred into and unto him in his own right as a Legacy, and not remain in him as Executor. As for ſums of Money bequeathed, or ſo much in Plate or Rings, it is evident that they muſt be had by the delivery of the Executor: Yet hath the Legatee ſuch an intereſt before delivery, as that, dying before payment, it will not go to his Executors. But, as I take it, no ſuch perſon to whom any thing certain is given by Will, can make any Gift or Grant of it before the Executor have aſſented to his having thereof: nor, perhaps will the Executor's aſſent after the Grant

27 H. 6. 8. Of late, perhaps, ſome ſingle or ſudden opinions may alſo have run that way: but in *Perman's* Caſe the Point was divers times argued, and then adjudged as before.

To be bought.

Grant have ſuch relation as to make good the Grant precedent; Why ſo, yet more than an Attornment of a Leſſee, which is a like Aſſent to the Grant of another? And *Quær.* if by the Outlawry of the Legatee before the Executor's Aſſent this thing bequeathed be forfeited.

Quær. Of this ſee more after, *Tit.* Legacy thereabout.

If without juſt cauſe an Executor will refuſe to aſſent, he is compellable by Law Spiritual, or Court of Conſcience; yet if Spiritual Court preſs to do, where is juſt cauſe to ſtay, a *Prohibet* lieth, *ut credo*; for ſince Executors ſtand liable to recovery of Debts againſt them by Common Law, it is reaſon that Law enable them to keep wherewith to pay. And here yet note ſome ſeeming oppoſition in the Law: For where before great difference was ſhewed between a Deviſe or Bequeſt, and a Gift or Alienation executed in one's life time; yet the Lord *Dyer* reports it to be reſolved, That where a Leaſe for years was made upon condition that the Leſſee ſhould not alien in his life time, yet a Bequeſt of this Leaſe by his Will was a breach of the Condition, as being an Alienation in his life time.

3. Of diſcharge by Will to a Debtor ſome queſtion may be, whether to per-

perfect and make good this, ſo as the Debtor may plead it in Bar, there be not requiſite, as in the former, an aſſent of the Executor? On the one ſide ſince this giving is a forgiving, for he to whom it is bequeathed cannot otherwiſe have it than by way of Retainer, it may probably be ſaid, that here needs no ſuch aſſent of the Executors, as in the Caſe where any thing is to be transferred; for here is rather an Extinguiſhment and an Exoneration, than a paſſage of a Chattel by way of Donation. On the other ſide, it is probable that it being but a Bequeſt, and ſo a Legacy, ſince Debts are in Law and Conſcience to be ſatisfied before any Legacies, therefore the Executor having not ſufficient otherwiſe to ſatisfie his Teſtator's Debts, may ſue for this Debt, and refuſe to ſuffer it to paſs away as a Legacy. And to this opinion do I encline as beſt for Creditors, and ſatisfaction of Debts is by Law reſpected as an act greatly concerning the Teſtator's Soul. But ſome will, perhaps, make a contrary doubt, that although there be an aſſent of the Executors to this diſcharge, yet it will not amount to a Legal Releaſe; for that a Debt at leaſt if it be by Specialty,

cannot

cannot be releaſed but by Deed, and a Will is no Deed; for a Seal is not neceſſary thereunto, though it be fit and convenient. Whereto I give this anſwer, that a Will, though it be not properly and legally a Deed, for it may be good enough without Seal, which is an eſſential part of a Deed; yet hath it the force and effect of a Deed: for as a Releaſe cannot be made but by Deed; ſo neither can an Eſtate or Intereſt, though but for years, in Tithes, Advowſons, Commons, Fairs, and like things, be granted or aſſigned otherwiſe than by Deed; yet it is clear that ſuch a State for years in any of theſe may be given by Will, as well as a Leaſe of Land; which proves a Will to have the force and effect of a Deed.

Not *de eſſe*, but *de bene eſſe*.

Of making a Debtor or Creditor Executor: and firſt of the Debtor made Executor.

SUppoſe we then that *A* and *B* being made Executors, the Teſtator was indebted to *A* twenty pounds, and *B* was indebted to the Teſtator twenty pounds, how do things ſtand preſently upon death? Firſt, it is clear that the Debt of *B* to

21 H. 7. 31. Plow. Com. 185. *contr. Danby & Choke*, 8 E. 4. 3.

B to the Teſtator ſtands in Law extinct; this making of him Executor being a Releaſe in Law.

And may be granted, that he ſhould account before the Ordinary for it.

Therefore let Creditors take heed of making their Debtors Executors. And yet doubtleſs (methinks) ſuch a Debtor made Executor ſhould hold himſelf reſtrained in Conſcience from taking benefit thereof, if (the Debt remitted) there ſhall want to ſatisfie either Debt or Legacy of the Teſtator. And I doubt whether a Court of Conſcience may not juſtly ſo order, the Teſtator being perhaps ignorant of this point in Law, that this Debt ſhould be releaſed by making the Debtor Executor.

Yet it ſeems *Plowd.* 186. *a.* the Law was taken to be as *ſupra.* 8 *E.* 4.

Though he never adminiſter. 21 *E.* 4. 3. 81. 11 *H.* 6. 38.

And what is ſpoken of making the Debtor Executor, generally the ſame is to be underſtood of making any one of the Debtors Executors, where there be many joint-Debtors: and ſo where many Executors be made, and but one of them is Debtor to the Teſtator; for they cannot ſue without making him who is the Debtor alſo a Plaintiff, which he cannot be againſt himſelf. The like Law touching Action of Treſpaſs or Account. Yet of old, where one made his Bailiff one of his Executors together with *A* and *B*, who brought

2 *R.* 3. 20. *per Starkey, & 22. per Vavaſor.* 9 *H.* 5. 13. Left a Demurrer in Treſpaſs by all, againſt the Executor, who was Treſpaſſer.

brought an Action of Account againſt the Bailiff in their two names only, Juſtice *Herle* held the Action well brought. This was in the beginning of King *Edward* the Third his time; but the contrary hath been ſince reſolved. Some alſo have held, that though in the life of this Executor who was a Debtor he could not be ſued; yet after his death, the ſurviving Executors might ſue his Executor. But that cannot be, as I take it, for that Debt was utterly extinct by the making of him Executor, as if the Teſtator had releaſed it to him; yea, though his Executor died before he did ever Adminiſter or prove the Will. And like extinguiſhment of the Debt, if the Creditor marry with one of the Executors of the Debtor: yet was there an Action of Debt maintained *temp. Ed.* 3. by the Husband and Wife againſt the Husband and other Executors, upon an Obligation by the Teſtator to the Wife before her Marriage. But if a Debtor take Adminiſtration of the Goods of his Creditor, this, methings ſhould not diſcharge him, but this his Debt ſhould ſtand as *Aſſets* in his hand, becauſe the Inteſtate did no act to free him from the Debt.

3 *Ed.* 3. 23.
6 *H.* 4. 3.
8 *Ed.* 4. 3. *Cook.*
21 *H.* 7. 31.
20 *E.* 4. 17.
21 *E.* 4. 8. 61.
Plowd. Com. 36.
Plowd. Com. 185.
11 *H.* 4. *fol.* 83, 84.
31 E. 3. *Fitz. Ex.* 72.

The

The Debtee or Creditor made Executor.

THis making of the Debtee Executor, and ſo the party who both ſhould pay and be paid the Debt, giveth him clearly power to pay himſelf before any other, if his Debt be by Specialty, or upon Record. Nay, ſome have held, that ſo much of the Goods of the Teſtator ſhall be altered in property out of the Executor as Executor, into him as Creditor; but how that can be I cannot ſee: For whether it ſhall be ſatisfied out of the Leaſes and Chattels, real or perſonal, whether out of the Corn in the Barns, Cattel in the Fields, Plate, or Houſhold-ſtuff, this, till ſome election made by this Debtee Executor, cannot be known, nor ſhall be effected by any operation of Law preventing the Executor's election in taking his ſatisfaction where and how he will. For certainly, as an Executor hath election to pay which Creditor he will firſt, ſo hath he election to pay and ſatisfie himſelf by what part of the Teſtator's Goods he will; yet, perhaps, if there be ready Money in the Executor's hands, there ſhall be an alteration

Plow. Com. 158. By all the Judges but *Brook* Chief Juſt. *Plow.* 185. b. where the goods be of more value, which ſhall be ſo altered.

See *Plowd Com.* 544. the like of a Legacy of 20 l. given to the Executor.

Or if the Goods amount in all to no more than this Debt.

teration of the property of ſo much thereof as was owing by the Teſtator to the Executor. And if there come not to the hands of ſuch Executor ſufficient to pay himſelf, he may have an Action of Debt againſt the other Executors, or the Heir, as by ſome hath been conceived: Yet let it be well adviſed of, whether, if he do Adminiſter at all, and eſpecially if he pay himſelf any part, he have not thereby barred or diſabled his Suit for the reſidue. But if he refuſe to Adminiſter at all, it were very unreaſonable that he ſhould not be able to ſue the other Executors: for ſo a Debtor might by ſubtilty make his Creditor an Executor with others, and take a courſe that his Goods ſhould come only into the hands of thoſe others, ſo as the Creditor could not pay himſelf; and conſequently, if he could not ſue the other Executors, he ſhould thus be ſtripped of his Debt by a ſleight. *Quær.* if he may bring the Action in the name of the other Executors only, the Will being proved in his name as well as in the names of the reſt; or whether the Action ſhall not be brought in his name alſo, and then he be ſevered at his own prayer. But againſt the Heir there is none

See *Plow. Com.* 158. 18 H. 8. 15. 18 H. 4. 83. 12 H. 4. 21. 20 E. 4. 17. 21 E. 4. 8.

Plow. 184. b. & 185. b. He is barred; for he cannot apportion his Debt.

none to joyn with him: and him may he ſue, if he have not Adminiſtred as Executor; this admitted, that the Bond extend to the Heir, which without expreſs words it doth not, though for the Executor it be otherwiſe.

12 H. 4. 21. He may ſue the Heir, if the Heir be bound, and he hath not ſufficient Goods as Executor.

Thus having conſidered of the ſtate of things before and without any Will proved, or other act done by Executors; we ſhould now come to the point of the proof: but two things pertinent to it are in order precedent.

CHAP. III.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of refuſal, and the things incident thereunto.*

Before Probate what may be done by or to Executors.

AS to this, it is clear, that before proving of a Will by the Executor he may ſeiſe and take into his hands any of the Goods of the Teſtator; yea, enter into

into the Houſe of the Heir (if not locked) ſo to do, and to take the Specialties of Debts; and generally he may do all things which to the Office of an Executor pertain, (except only bringing of Actions and proſecution of Suits.) He may pay Debts, receive Debts, make Acquittances, and Releaſes of Debts due to the Teſtator, and take Leaſes or Accquittances of Debts owing by the Teſtator: yea, if before ſuch proving the day occur for payment upon Bond made by or to the Teſtator, payment muſt be made to or by this Executor, though no Will be proved, upon like pain of forfeiture as if the Will were proved. Alſo an Executor may before Probate ſell or give away any of the Goods or Chattels of the Teſtator. And whereas the Aſſent of an Executor is neceſſary to the ſetling and execution of a Legacy, as before hath been ſhewed; ſo as if one give me his white Horſe, or black Cow by Will, or any other well known thing, I cannot after his death take it, though I come where it is, but am puniſhable by Action of Treſpaſs at the Executor's Suit, if he do not aſſent; yet an Executor before the Will proved may give his Aſſent, and it will ſtand good. Yea, although

9 E. 4. f. 33. 47. 7 H. 4. 18. They cannot ſue till they have the Will under the Seal of the Ordinary.

Wray. 23 El.

he die after any of theſe acts done, the Will being never proved by him; yet do theſe Acts ſo done ſtand firm and good, as I take it. Yet (as I find) an Executor making his Will, and dying before he hath proved the Will of his Teſtator, his Executor may not prove both the Wills, and ſo become Executor to both the Teſtators. But in caſe the Goods were after Debts paid, bequeathed to the Executor, his Executor may take Adminiſtration of the firſt Teſtator's Goods with the Will annexed; as by Doctor *Drury* was in the late Queen's time declared to be the Law and courſe of the Court Spiritual; to which credit was given by the Judges of our Law and the Court of *Star-Chamber*: for though the Book do not mention it to have been in *Star-Chamber*, it is elſewhere ſo reported. Yea, an Executor, for Goods of the Teſtator taken from him, or a Treſpaſs done upon the Leaſe-Land, or a Diſtraining or Impounding of Goods or Cattel, may maintain before the Will be proved, Actions of Treſpaſs, or Replevin, or Detinue; for theſe Actions ariſe upon the Executor's own Poſſeſſion.

22 & 23 E. Dy. 372.

Dy. *in* Plow. *Com.* 281. Caſe of *Greysbrook* and *Fox*.

But before the proving of a Will, an Executor

Executor cannot maintain a Suit or Action of Debt, or the like. And the reaſon is, for that therein he muſt ſhew forth the Will proved under the Seal of the Ordinary. And ſo, as I take it, muſt it be if he bring any Action for Treſpaſs done or Goods taken in the Teſtator's lifetime; ſo as the Teſtator himſelf was entitled to the Action, and it grows not upon the Executor's Poſſeſſion. I find that an Executor granting the next Avoidance of a Church which to him came from the Teſtator, the Grantee maintained a *Quare Impedit*, without ſhewing forth the Will: But the Executor himſelf might ſo have done as of his own Poſſeſſion before the Will proved, and ſo without ſhewing it under the Seal of the Spiritual Court, as well as Actions of Treſpaſs or Replevin, for Goods taken after the death of the Teſtator: yet in the principal Caſe of *Greysbrook* and *Fox*, which was an Action of Detinue by the Executor for Goods taken or detained after the Teſtator's death, the Plaintiff did ſhew forth the Will proved. But that proves not any neceſſity thereof; or that, if the Will had not been proved, it could be no hurt to ſhew it forth. So upon his

34 *P. & M.* Dy. 135. a. Dy. *in* Plow. Com. 281. a.

Plow. *Com.* 275. b.

own Contract for the Teſtator's Goods: as if the Executor ſell Cattel or other Goods of the Teſtator before the Will proved, he may for the Mony payable maintain an Action for Debt before he have proved any Will: and in this, and the Action of Treſpaſs, there is no neceſſity of naming him Executor. Alſo, on the other ſide, an Executor may well enough be ſued for Debts of the Teſtator before the Will be proved; for he may not by his own act of delaying the Probate of the Will keep off Suits, except he will refuſe in due manner, that ſo Adminiſtration being granted, there may be ſome body ſuable by the Teſtator's Creditors for Debts by him owing. And the uſual Plea of the Defendant, to eſtrange himſelf from the Teſtament, is to ſay, that he neither is Executor, nor hath Adminiſtred as Executor. So as if he either be Executor *de jure*, or *de facto*, by his own Act of Adminiſtring, it ſufficeth.

Of refuſal to prove the Will, and therein of Adminiſtration, fore-cluding Refuſal.

NOw as touching this other point fit to be thought of before we meddle with the Probate, *viz.* Refuſal to prove; we will thereabout conſider theſe ſeveral parts, *viz.* Firſt, how and in what manner Refuſal may or muſt be. Secondly, in what caſes or in reſpect of what Acts one named Executor hath loſt or determined his election of Refuſal or Acceptance. Thirdly, of what effect and operation the Refuſal is; what difference where all the Executors refuſe, and where but ſome or one of them. Fourthly, what Relation it hath.

Now touching the firſt: The Ordinary before committing Adminiſtration, where a Will is made and Executors named, if he know of it, muſt ſend out Proceſs againſt the Executors to come in and prove it: and if they do not come, they are to be Excommunicate; but if they do come, if they, nor any of them, will prove, by reaſon of ſuch Refuſal the Ordinary may commit Adminiſtration: perhaps alſo they may be appointed Exe-

3 *H.*7.14.

9 *Ed.*4. 47.
3 *Hen.*7. 14.
Plow. *Com.* 281.

cutors at a time future, and not preſently. Now Refuſal cannot be verbally, or by word, but it muſt be by ſome Act entred or recorded in the Spiritual Court, and therefore muſt be done before ſome Judge Spiritual, and not before Neighbours in the Country; for that is not effectual. Yet Sir *Ralph Rowlet* making the Lord Keeper *Bacon*, *Catlin* Chief Juſtice, and the Maſter of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorſhip, and therefore wiſhed him to commit Adminiſtration, who did ſo, making every of their Refuſals to be recorded: and this was held good. So as a Leaſe being by that Will bequeathed to *Catlin*, and he after this Refuſal, entring and aſſigning it to one, and the Adminiſtrator aſſigning it to another; it came in queſtion between them whether had beſt right; and Judgment was given for the Aſſignee of the Adminiſtrator againſt *Catlin*'s Aſſignee: whereas if the Refuſal had been void, *Catlin* had continued Executor, and ſo his Title had been better. For in caſe the Ordinary himſelf be made Executor, there (ſaith the Book) he may refuſe before his Commiſſary; and ſo was it there pleaded for the

9 *Ed.* 4. 33. See *Pl.* 184. *a.* If Debtee made Executor ſue the Ordinary for the Debt, this amounts to a Refuſal of the Executorſhip.

M 28 & 29 *Eliz. inter Brooker & Carter, in Ba. Com.*

9 *Ed.* 4. 33. The Book calls him Cardinal of *Canterbury.*

the Archbiſhop of *Canterbury*, who was made Executor to Sir *Will. Oldhalle.*

What ſhall be ſuch a medling or Adminiſtring by an Executor, that he cannot refuſe after.

AS to the ſecond, where an Executor hath Adminiſtred he cannot afterwards refuſe, becauſe he hath already accepted of the Executorſhip, and ſo determined his election: at leaſt the Ordinary ought not to accept of ſuch Refuſal, but ſhould compel him to take upon him the Executorſhip, as the Law was taken both in the time of *Ed.* 4. and of Queen *Elizabeth.* Yet if the Ordinary do admit one to refuſe, notwithſtanding that he hath Adminiſtred, this ſtandeth good, as it ſeemeth conceived by the Judges in the time of *Henry 6.* For there the Executor commanded one to take the Goods of the Teſtator out of the hands of *J S*, who did accordingly, and afterward the Executor refuſed before the Ordinary, and Adminiſtration was committed to the ſaid *J S*, who brought an Action of Treſpaſs againſt the party ſo taking the Goods from him; and there

9 *Ed.* 4. 47. Selling Land as Executor is Admin. *Dyer* in Caſe of *Greysbrook* and *Fox. Pl. Com.* 280. *b. Poſ.* 7 *Eliz.* 36 *Hen.* 6. *f.* 7, 8.

the Refuſal and committing Adminiſtration were admitted to be good: ſo perhaps, *Factum valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executor's ſuch intermedling at the time when he did admit his Refuſal. After Refuſal, and Adminiſtration committed, the Executor cannot go back to prove the Will, and aſſume the Executorſhip: but if only upon the Executor's making default to come in upon Proceſs to prove the Will, the Adminiſtration be committed; here the Executor may yet at any time after come and prove the Will, and ſo undo the Adminiſtration: as was in the late Queens time reſolved between *Bale* and *Baxter*.

Mich. 27, 28 *Eliz.*

But what if after Refuſal it ſhall appear to the Ordinary, that the Executor hath Adminiſtred before his Refuſal, ſo as had it been then known, the Ordinary ſhould not have admitted him to refuſe? Whether now may he revoke his Adminiſtration, (for it is revokable) and enforce the Executor to proceed to proving of the Will? And ſurely, methinks he may; for that the Executor by Adminiſtring had determined his election, and accepted the Office of Executorſhip: now

Boxel's Caſe in *Com. Ban.*

now he cannot both accept and refuſe. Beſides, we know that Creditors may maintain their Suits againſt him having once Adminiſtred; the Common Plea to free himſelf, and to ſhew that he is not the party ſuable for the Teſtator's Debt, being that he neither is Executor, nor ever did Adminiſter as Executor; wherefore he having Adminiſtred, it will be found againſt him. Now it is not congruous that in the Spiritual Court there ſhould be no Executor, and yet in the Courts of *Weſtminſter* there ſhould be an Executor. But ſince this point of Adminiſtring is ſo material to the point of being admitted or not admitted to refuſe, we will here conſider in this place briefly what ſhall be ſaid to be an Adminiſtration by an Executor determining his election, and diſabling his Refuſal, and what not.

A being Executor did adminiſter, and yet would not prove the Will. *B* took Adminiſtration; and being ſued for Debt, did plead the matter *ſupra*, and it was held a good Plea; and it was found for him before Juſt. *Dotheridge ad Ox.* in a Stat. 2 *Cartl. Rog.*

32 H. 6. 7.

1. Some will perhaps conceive, that the Act of the Executor in the fore-mention'd Caſe, where he only commanded *J S* to take Goods of the Teſtator's out of a ſtranger's hands, was no Adminiſtration; and it is true that in that Book it is paſſed in ſilence, and not expreſly ſaid to be an Adminiſtration. But the L. *Dyer* in the Caſe of *Greysbrook* and *Fox*, ſpeaking of that Caſe,

Caſe, ſaith expreſly, that the Ordinary might there have rejected the Executor's Refuſal; for, ſaith he, when the Executor had once intermedled, he ſhould not have been ſuffered to refuſe: ſo as he doth clearly admit that to have been an Adminiſtration. Aud elſewhere it is held, that if an Executor take Goods of the Teſtator, and convert them to his own uſe, This is an Adminiſtration; yea, if he do but take them into his hands, ſay ſome, without converting of them. If the Wife take more Apparel of her own than is neceſſary, this is an Adminiſtration, as the Book admits; but if by the aſſent or delivery of the Executor, it is not. More clearly, If one do either pay Debts of the Teſtator, or receive Debts, or make Acquittances for them, or demand the Teſtators Debts as Executor, or give away Goods which were the Teſtator's, or deliver Mony of the Teſtator's for Fees about proving the Will; all theſe be full and clear Adminiſtrations as Executor. But, ſaith *Fitzherbert*, if he only lay out his own Mony for Fees, this is no Adminiſtration; ſo ſaith *Frowick*, if he pay Debts with his own Mony, and if he do it about the Funerals. But ſome difference may

20 Ed. 4. 17. & 21 E. 4. 5.

21 Ed. 4. 5. 21 H. 6. 19, 20. 33 H. 6. 31. 8. 1 El. Dy. 166 13 Ed. 3. Exec. 91. 3. 4 Ma. Dy. 135. 26 H. 8. 7, 8. 20 H. 7. Kelw. 63. 21 Ed. 4. 5. 20 H. 7. f. 5. a.

may be between Acts done by one named Executor and by a ſtranger, *viz.* to make him an Executor of his own wrong; whereof we ſhall ſpeak after, not in this place. If one being ſued as Executor take it upon him, and plead in Bar as an Executor; this is an Adminiſtration. 9 *Ed.* 2. 13, 14. 33 H. 6. 31. a.

Of the force and effect of Refuſal.

AS to the third Point, *viz.* The force or effect of Refuſal; firſt, it is clear that if there be but one Executor, and he do refuſe, or being many, if they do all refuſe, then is the party dead Inteſtate, and Adminiſtration is to be committed with the Will annexed, as is before ſaid, nor can any after meddle as Executors. But in caſe there be divers Executors, *viz.* *A*, *B* and *C*, and *A* only refuſeth, and the Will is proved by the others, there *A* continueth Executor notwithſtanding his Refuſal; ſo as he ſtill may releaſe Debts of the Teſtator, and Debts owing by the Teſtator may be releaſed to him; yea, if Suit be to be had by or againſt the Executors, it ſhall not be in the name of *B* and *C* only, but *A* alſo muſt be named as a Plaintiff or Defendant, Cook *l.* 5. *f.* 28. *Com.* 18 E. 3. Bro. 8. 37. 22 *Ed.* 3. 19. 15 *Ed.* 3. *Exec.* 8. 41 *Ed.* 3. *f.* 22 21 *Ed.* 4. *f.* 24.

fendant, elſe the Action may be overthrown. For the Will being proved, all the Executors therein named ſtand and continue Executors, notwithſtanding any of their Refuſals; as it was reſolved in the later end of the late Queens time, according to divers former Reſolutions. And therefore this Executor which hath refuſed may afterwards Adminiſter at his pleaſure, and intermeddle with the Goods as well as the others: yet, ſaith *Brook*, Chief Juſtice after the death of his Companion he cannot ſo do; but then the Executor of him who proved is only to adminiſter. *Quod non eſt Lex.* There may be ſome difference between Suits by Executors, and Suits againſt Exeeutors: For when they themſelves ſue, they being privy to the Will and having the cuſtody of it, muſt bring their Action in the name of all the Executors according to the Will; but he that is to bring an Action againſt them need not, perhaps take notice of more Executors than thoſe that have proved the Will, or otherwiſe do Adminiſter: for it is no good Plea for themſelves in an Action againſt them to ſay there is another Executor, without ſaying alſo that he hath adminiſtred, as it ſeemeth

42 *El.Co.9. fol.* 36,37.

4 & 5 *Ph. & Ma.* Dyer 169. c. 6. *Contra.* 21 *E.* 4. 23,24.

eth by divers Books. Nay, one Book in the time of *Henry* 8. goeth farther, *viz.* That if the Suit be brought againſt all, yet one of them not intermedling with the proving of the Will may plead that he was never Executor, nor adminiſtred as Executor. By this it ſhould ſeem that Executors refuſing, (I mean all of them, ſo as no Will is proved) they in an Action againſt them may ſay that they were never Executors: but methinks, they ſhould not ſo plead, but ſhew the ſpecial matter, as was done in the time of *Edward* the fourth.

33 *H.*6.38.*a.* Co. 9. 37. 6. 32 *H.* 6. 25. 27 *H.* 8. 11. *per totam Curiam.*

As for Relation, I will forbear to ſpeak, till I come to proving; for that Probate and Refuſal ſtand in the ſame ſtate as touching Relation.

9 *Ed.* 4. 33. Co. 9. *f.* 36.

CHAP. IV.

Of Proving Wills.

NOw let us ſee touching the Probate of Wills what is conſiderable; and therein of theſe three or four parts:

1. *Where, and before whom, and how the Proof muſt be.*

2. *What*

2. *What ſhall be* Bona notabilia, *to intitle to Probate.*
3. *What force or validity either a right or erroneous Probate hath.*
4. *What relation either Probate or Refuſal hath.*

As touching the firſt point, *viz.* How, and where, and before whom, Wills are to be proved, briefly thus:

The proving is in the Spiritual Court: yet in ſome Mannors, by Preſcription, Wills are to be proved before the Steward, though no Lands thereby paſs, as appears by divers Books: and in the Mannor of *Maunsfield* is this Preſcription; and in others, whereof *Tremaile* was Steward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge touching the Mannors of *Cowly* and *Caverſham* in the County of *Oxford*, where I have kept the Courts of the Lord Vicount *Wallingford*, and found it in preſent and frequent uſe. And it is ſaid by the Judges in the time of King *H.* 7. That this proving of Wills in the Court Spiritual is not ancient, but of later time. Yea, it is acknowledged by *Linwood*, the Dean of the Arches, that it pertains not to the Spiritual Court of common right; nor

2 R. 3. Fitz. Co. *lib.* 9. *fol.* 43.

11 H. 7. 12.

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is ſo in uſe in other Kingdoms. The reaſon why the Law of *England* hath herein given way to the Ordinary and Court Spiritual, is ſaid by *Walſh* in *Greysbrook* and *Fox*'s Caſe to be the Piety and Integrity which is preſumed to be in thoſe of that Function, having charge of Souls. Indeed they are as it ſeems to me, Executors of the New Teſtament, or laſt Will and Teſtament of *Jeſus Chriſt*, whereby great Legacies and Gifts are given to men, and by Paſtors to be diſpenſed and diſtributed: of which Diſtributers it is required, as St. *Paul* ſaith, *That they be found Faithful.* And happy are they who with him can plead *Plene Adminiſtravit*, *viz.* that they have fully Adminiſtred, as he did; much depending thereupon, *viz.* God's Honour the Bleſſing, Proſperity and Safety of the Country, the Piety, Juſtice, Conſcience, Contentation and Salvation of Men. As for Wills proved in *London* and *Oxford* before the Major, that is only in reſpect of the Burgages within thoſe places deviſable; but they were to be proved alſo before the Ordinaries in reſpect of the Goods, and there only where no Lands are bequeathed.

Plow. Com. 279.

1 Cor. 4. 2. Act. 20. 27.

The proving then is to be before the Ordi-

Ordinary, General, Particular, or Special. By General, I mean the Metropolitan or Arch-biſhop, before whom it is to be proved; in caſe the Teſtator have Goods valuable, called *Bona Notabilia*, in divers Dioceſſes whereof he is Superiour.

Vide fol. proxim. Of Bona Notab. both in Canterbury and York.

Of *Bona Notabilia.*

WHat ſhall be ſaid to be *Bona Notabilia* is conſiderable; for thereabout hath been much diverſity of opinion: Some holding that they muſt be of forty ſhillings value, ſome five pound, ſome ten pound; yea, ſome that the value of a peny ſufficeth to draw it to the Arch-biſhop from the particular Biſhop. But that difference of opinion I conceive to be now cleared by a Canon made in the firſt year of King *Charles* his Reign at a Convocation then held, whereby it is eſtabliſhed, that five pound ſhall be the ſum or value of *Bona Notabilia*; yet therein is this *Proviſo*, that where by Compoſition or Cuſtom in any Dioceſſes *Bona Notabilia* are rated at any greater ſum, the ſame ſhall continue not altered. It is likewiſe thereby provided, that if any Man die *in itinere, viz.* in his Jour-

Canon 92, 93.

Journey or Travel, the Goods which he then hath about him ſhall not cauſe that Adminiſtration ſhall be committed, or the Will proved before the Metropolitan.

Having conſidered of the value, now another Point obſervable is, what things ſhall be ſaid to be *Bona Notabilia*. And as to that, Debts owing to the Teſtator are *Bona Notabilia*, as well as Goods in poſſeſſion, their value being anſwerable: yet, I think if the Penal Sum of the Bond be but five pound for payment of a leſs Sum, although the Bond be forfeited, yet in the Spiritual Court, where reſpect to Conſcience ſuppreſſeth the favouring of Executors, this will not be taken to be *Bona Notabilia*, viz. of five pound value, although in Law the whole Penal Sum be a duty. But if the Debt be five pound or more, though it be deſperate, or due from the King, againſt whom no Suit can be, but only by Petition, yet this will ſtand for, and as *Bona Notabilia*, as I take it in the Court Spiritual; though thereabout I can but conjecture, ſince the Rules of our Law determine it not. And this Point, touching the King's being Debtor, I find debated

21 *Eliz.* ted in the late Queen's time, but not reſolved, ſo far as I find. But there *Popham* at the Bar urged that no Debt ſhould be *Bona Notabilia*; and if it ſhould, yet not ſuch for which no remedy by Suit, as in that Caſe, the Queen being Debtor. Yet a farther Queſtion Local is touching theſe Debts or things in Action, in what Place or Dioceſs they ſhall be ſaid to be as *Bona Notabilia*, *viz.* whether in the place where the Debtors be, or where the Obligations, or other Specialties be? And as to this, the Law hath been taken, That becauſe the perſons of the Debtors be moveable, paſſant and tranſitory; therefore theſe Debts ſhall be ſaid to be, and to make *Bona Notabilia* where the Bonds or other Specialties be, and not where the Debtors inhabit and dwell. And ſo was it not long ſince conceived by Juſtice *Walmſley*, and Juſtice *Beaumont* in one *Pretyman*'s Caſe, no other contradicting it. Herein therefore many are miſtaken, who only in reſpect that the perſons of the Debtors do dwell in foreign Dioceſſes, other than the places of the death of the Teſtator, or where his other Goods were, do take Adminiſtration in the Prerogative Court, though the Specialties remain-

Goods conſiderable, or conſpicuous.

Hil. 17 *Eliz.* M. Com. Da. *Vide* 13 & 14 *Eliz.* Dy. 305.

ed

ed where the party died, or his Goods reſidue were. But in caſe the Debts be only by Contract, without Specialty, then indeed they are to be eſteemed *Bona Notabilia* there and in that place where the Debtor is, as the ſaid Judges well conceived the difference. But in caſe Land be given to Executors for payment of Debts or Legacies, this ſhall not be *Bona Notabilia*, as I take it, though it be *Aſſets*.

Of the validity and invalidity of Probates.

AS to the third Point, we will firſt ſee of what validity an erroneous Proof is, and thereabout we ſhall find this difference. Admitting that one hath not *Bona Notabilia* in divers Dioceſſes, ſo as of right the proving of the Will appertaineth not to the Metropolitan, and yet the Will is proved before him; this is not meerly void, but ſtands in force till it be reverſed by ſome Sentence upon Appeal: as was reſolved between *Vear* and *Jeoffries*, in the late Queen's time. But on the other ſide, in caſe one have *Bona Notabilia* in divers Dioceſſes, or a Peculiar and a Dioceſs, and yet the Will is 22 *Eliz.*

proved before the particular Biſhop within whoſe Dioceſs part of the Goods are; this is meerly and utterly void, without any Reverſal. So alſo of proving in ſome Peculiar. And in caſe one have *Bona Notabilia* both in the Dioceſs of *Canterbury*, and in the Dioceſs of *York*; the Will muſt be proved either before both Metropolitans, if within each of their Juriſdictions there be *Bona Notabilia*, in divers Dioceſſes; or elſe, as I take it, if there be not ſo in any of the places, then before the particular Biſhops in thoſe ſeveral Dioceſſes where the Goods are. Or, if within the one Juriſdiction Metropolitan the Teſtator had Goods in divers Dioceſſes, and in the other but in one Dioceſs; then in the one place is the Will to be proved before the Arch-biſhop, and in the other place before the particular Biſhop, as I conceive. And ſo alſo of peculiar Juriſdictions. And in ſome places Arch-deacons have peculiar, or Juriſdiction Ordinary, and power to take Probates of Wills, and grant Adminiſtrations. But where any like error or miſproving is in theſe reſpects, it is cauſe of Reverſal or of Nullity, according to the former difference: ſo alſo if there be falſe-

hood

hood in the proof, were it *communi forma*, that is, without Witneſſes, or by examination of Witneſſes; yet may it in the Spiritual Court be undone, if either diſproof can be made, or proof of Revocation of that Will once made, or of the making of a later.

Now, admitting the Will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the Proof or Will ſo proved. It being under the Seal of the Ordinary cannot be denied, ſaith one Book, to wit, whether this ſhewed forth be a Will proved or not; no, though the Proof be but indorſed on the back, *viz.* that it is ſo proved, ſaith the Book. But notwithſtanding the Defendant ſo ſued may deny that the Plaintiff is Executor, as not being concluded nor eſtopped by the Probate ſo to ſay. And the reaſon is, becauſe the Seal of the Ordinary is but matter in Fact, and not matter of Record: nor are the Sentences of Divorce and the like, in the Spiritual Court, Judgments or matters of Record, as hath often been held.

9 Ed. 4. 47. 22 Ed. 4. 50. 22 H. 6. 52

Plow. Com 282. 44 & c. 3. 32. 19 Aſſ. p. 2.

Of the Relation of Probate and Refuſal.

AS for this laſt Point, both the Proving and the Refuſal ſhall have Relation to the death of the Teſtator, as I take it to divers purpoſes. So as to the Proving, ſaith the L. *Dyer* expreſly and confidently in *Greisbrook* and *Fox*'s Caſe; and the reſolution alſo of the Caſe proves it. For there Adminiſtration being committed before any Will proved or notified to the Ordinary, as it ſhould ſeem, the Adminiſtrator ſold ſome of the Goods to *J S*, and after the Executors (proving the Will) brought an Action of *Detinue* for thoſe Goods againſt *J S*, who pleaded this Adminiſtration and Sale: and thereupon the Executor demurred; and Judgment was given for him, as having by the proving of the Will diſproved the Adminiſtration *ab initio*. But it is true that Judgment was given only by two Judges; one being abſent, and the other diſſenting in opinion: yet I think it was right and according to Law; and that Refuſal ſhall have the like relation; elſe could not the Adminiſtration relate to the death of the Inteſtate, as it doth to ſome

Plow. *Com.* 281, 283.

18 H. 6. 12. 2. 9 E. 4. 33. 47. Not to make good a Releaſe made before. Co. *lib.* 5. 18.

pur-

purpoſes, expreſſed in divers Books, *viz.* to have an Action of Treſpaſs for Goods taken before Adminiſtration committed, and to have a Rent growing payable in that mean time. 39 H.6.8. 2 *Ma.* Dyer 110.

What Fees to be paid upon Probate, or for Copies of Wills or Inventories.

Per Stat. 21 *Hen.* 8. Cap. 5.

1. *Where the Goods amount not to above five pound, only ſix pence to the Scribe.*
2. *Where they be above five pound, but under forty pound,* 2 s. 6 d. *to the* BB. 12 d. *to the Scribe. Where above forty pound, to be taken but* 2 s. 6 d. *to the* BB. 2 s. 6 d. *to the Scribe, or* 1 d. *for each ten Lines of ten Inches long, at the Scribe's choice.*

THeſe Sums are to ſatisfie both for Proving, Regiſtring, Sealing, Writing, Praiſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the ſame.

Where Land is given to be ſold, neither

the Mony raiſed, nor the Profits thereof ſhall be accounted as any of the Teſtator's Goods or Chattels, ſaith the Statute.

Note, That the Will is to be brought with Wax thereunto ready to be ſealed, and proof to be made of the Will, according to Common Cuſtom.

For making the Inventory, the Executor is to take or call to him two Creditors or Legatees of the Teſtator, and do it in their preſence; or, in their abſence or refuſal, two honeſt perſons being the next of his Kin; or, in their default, two other honeſt perſons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make Oath for the truth of it.

For a Copy deſired by any, either of a Will or Inventory, no more is to be paid than before is allowed for the Regiſtring; with the like election to the Scribe or Regiſter, as is above ſaid.

Mr. *Swinborn* ſaith, That an Executor is to ſwear, and if it ſhould be thought fit, to be bound to make a true account, when he ſhall be thereunto lawfully called by the

the Ordinary. Of this Account ſee in Page 274. And of accounting ſome Books of the Common Law make mention, as 13 *Edw.* the third, *Fitzherbert Exec.* 91. where *Trew* ſaith, That of a thing in Action no Account ſhall be before the Ordinary; but *Parn* ſeems of a contrary opinion. And elſewhere it is ſaid, that where a Debtor is made Executor to the Debtee, he ſhall yet account before the Ordinary for this Debt: yea, as of Mony in poſſeſſion, ſaith one; which others denied.

An Executor by wrong ſhall be drawn to account before the Ordinary, ſaith *Moyle* Juſtice. But ſaith *S. German*, he may not force any to account againſt the Order of the Common Law; (not ſhewing what that is.) And *temp. Edw.* the 4. it is ſaid, at leaſt by the Reporter, that after the Will proved, the Ordinary hath no more to do: *quod non credo.*

Alſo of the Oath of an Executor divers Books tell, but not to ſuch purpoſe as *Swinb.* but truly to perform the Will.

See alſo 31. E. 3. *cap.* 11. An Adminiſtrator ſhall account as an Executor, Fitz. *Ex.* 91. & 837. *viz.* 18 E. 2. *Tit.* Brief. 48 E. 3. 14, 15. Of a duty reſting in account it is ſaid, the Legatee ſhall have remedy by Account in the Spiritual Court. 18 *Ed.* 4. *f.* 3. Moyle. 4 *H.* 7. 15. *per* Wood. 9 *Ed.* 4. 47. Doct. & Stu. 78. b. 21 E. 4. 22. Plowd. *Com.* 544. 4 *H.* 7. 16. Kelw. *Rep.* 64. a.

CHAP.

CHAP. V.

What things ſhall come unto Executors, and be Aſſets *in their Hands, and what not.*

THE things which ſhall come to Executors are of great multiplicity, and would make a large and confuſed heap if tied together in one bundle or lump. I will therefore divide and ſort them out in parts, after the beſt manner I can. Firſt, we will divide them into things Poſſeſſory, or actually in the Teſtator; and things in Action, or not actually in the Teſtator. Secondly, the Poſſeſſory into Chattels, real and perſonal; or (as ſome leſs properly expreſs it) movable and immovable.

Of Chattels real Poſſeſſory.

THeſe may be divided into two kinds, *viz.* living, and not living. The living are not many and various. 1. The Wardſhip of the body of another (be it by reaſon of a Tenure of the preſent Owner, or by Aſſignment from the King or other Lord of whom the Tenure was) is a Chat-

a Chattel real, not perſonal, though it be an intereſt in the perſon of another; but it is in reſpect of a Tenure of Land, or other Hereditament, and is for years, *viz.* during the Minority, or till Marriage had, and ſo is real. Next, a Villain for years (as by Grant for a Term from him that had the Inheritance) is a Chattel real. As for an Apprentice for years, it is by Cuſtom, as I take it, that he goeth or is derived to Executors: But for reaſon after ſhewed, I think this Intereſt be not in the reality, but in the perſonality rather. So of a Debtor in Execution for Debt, the Intereſt in him, or perhaps more properly in his Liberty, is not, as I conceive, (for reaſons which after I ſhall expreſs) a real, but a perſonal Chattel. The like Law of a Priſoner taken in Wars. As for Fiſhes in a Pond, Conies in a Warren, Deer in a Park, Pigeons in a Dove-houſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Park and Dove-houſe, they are not Chattels at all, nor to go to the Executors, but to the Heir, with the Inheritance. If the Teſtator were but a Termer, they are to go to the Executor but as acceſſary Chattels, following the ſtate of

of their principal, *viz.* the Warren, Park, Dove-houſe, Pond, *&c.*

The real Chattels not living are either in Houſes or Lands moſt uſually, and that three ways: Firſt, by Leaſe for years: Secondly, by Wardſhip of Lands held by Knight's-Service: Thirdly, by Extent upon Judgments, Statutes, or Recognizances; or in things iſſuing out of Houſes or Lands, as Rents, Commons, Eſtovers, or ſuch like. But where an Inheritor reſerves a Rent upon a Leaſe for years, this ſhall not go to the Executor, but to the Heir, with the Reverſion, other than Arrerages of it behind at the death of the Teſtator. Alſo Commons, Corodies for years, Advowſons, Tithes, Fairs, Markets, Profits of Leets, and ſuch like, which the Teſtator had for years, all which may accrue any of theſe ways as the firſt, are Chattels real. Yea, one ſimple Preſentation to a Church, upon the next Avoidance is a real, and not perſonal, Chattel, before it come to be void; and what then it is we ſhall after ſhew. And the Title accrued to the Crown upon Attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vaſtum*, that

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is, power not only to take the Profits for a year, but to waſte and demoliſh Houſes, and to extripate and eradicate Trees and Woods, is but a Chattel; and therefore though granted to one and his Heirs by the King, yet ſhall go to the Executor, and not to the Heir. *Temp. E. 1. Aſſize 124. Fitz.*

Some doubtful or leſs clear Caſes touching Chattels real.

FIrſt, where we ſpeak of Wardſhip, it is not to be underſtood of Wardſhip by reaſon of Socage Tenure, for that goeth not to the Executor, but he ſhall be next Gardian who now, after the death of the firſt Guardian, ſhall be next of Kin, if the Ward continue under fourteen years old; elſe he is out of Wardſhip. Secondly, if one have a Leaſe for three lives to him and his Aſſigns, this is no Chattel, nor ſhall go to the Executor, nor to the Heir, but to him who firſt enters and claims it as an Occupant, if no Aſſignment be in the life of the Leſſee made: Contrarily of a Leaſe for many years, if three, or more, or leſs, ſo long live, this is a Chattel, and ſhall go to the Executor. So an Extent upon 37 *Aſſ. p.* 1.

upon a Statute, yet it is delivered to the party as a Free-hold, *viz.. ut liberum tenementum*; but that only makes it to be *quaſi liberum tenementum* as to the maintaining of an Aſſiſe, if wrongfully put out. Where one is ſeiſed in the right of his Wife of Land, or other Hereditament, and is attainted of Treaſon or Felony, the profit thereof accruing unto the Crown is but a Chattel; and though the King grant it to one and his Heirs, yet it ſhall go to his Executors. And if one having a Leaſe for many years, *viz.* 100, 500, or more or leſs, doth deviſe and bequeath the ſame to *A* and the Heirs-males of his body, and for want of ſuch Iſſue to *B* and the Heirs-males of his body, and dieth, having Iſſue a Son; the Term ſhall not go to his Son, but to his Executor or Adminiſtrator; for it cannot be made a matter of Inheritance. So if *A* had died without Iſſue Male, the Term ſhould not have gone or remained to *B*, but to the Executor or Adminiſtrator of *A*; as was lately adjudged in the Exchequer between Sir *Robert Lewknor* and Mrs. *Hammond*. So of an Advowſon, or any other Hereditament, granted or deviſed to one and his Heirs for

4 E. 3. *Aſſ.* 166. Bro. *Chat.* 15.

for 100 years: or if such a Termer grant a Rent out of the Land to *A* and his Heirs, or the Heirs or Heirs-males of his body; yet shall the same go to the Executor, and not to any Heir; for it being derived out of a Chattel, cannot be any Free-hold or Inheritance, but is it self a meer Chattel. *Partus sequitur ventrem.*

39 E. 3. 37. So *Manwood*, If granted for life, it is but a Chattel. Plow. Com. 524.

Of Chattels personal.

PErsonal Chattels, or Goods moveable, are also in like manner to be divided into quick or dead. The quick are Cattel of all kinds; as Sheep, Horses, Kine, Bullocks, Swine, Goats, Geese, Ducks, Poultry, *&c.* There may be also in living Creatures reasonable an Interest as in a Chattel personal; as in the person of a Man taken in Execution for Debt. And this I hold to be in nature not a real, but a personal Chattel, (as before was touched) for that Debt is the root of it, and the Body is but a pledge or gage, dischargeable instantly upon Payment, Release, or other Discharge of the Debt. Like Law of a Prisoner taken in the Wars; for thereof and

No. na. br. 88. Reg. brig. f. 102. There is mentioned, that the priſoner was to have 1591. for his ranſom. Bro. no. ca. 295. & 5th. Property 38.

therein, as in a Chattel, hath the party a legal Intereſt: as appears by a Writ of Treſpaſs in that Regiſter for taking away a Priſoner, *viz.* *Quare quendam Scotum Priſonarium ſuum cepit*, &c. And note lately, *viz.* in the time of King *Hen.* the 8th, the King himſelf, upon the winning of *Bullen*, bought divers Priſoners of his Subjects. And by a Statute in the beginning of *Hen.* the *6.* his time, this Intereſt in a Priſoner is mentioned as valuable, and coming from one King unto another; therefore, doubtleſs ſhall go from Teſtator to Executor by death, and not to be infranchiſed or freed thereby. The intereſt which one hath in an Apprentice I take to be rather perſonal than real, though for years, becauſe not ſpringing out of any real Root, as Wardſhip and Villainage do, but out of a meer Contract. As for a Servant whoſe Maſter is dead, doubtleſs he is legally diſcharged, and is not Servant either to Heir or Executor: but meet and honeſt it is that one of them continue him in ſervice, till a fit time of providing for him a new Maſter; and fit for him, not to depart ſuddenly.

1 H. 6. c. 5.

Now for things perſonal without life,

theſe

these are evident, *viz.* all Houshold-stuff, Implements and Utensils, Mony, Plate, Jewels, Corn, Pulse, Hay, Wood felled and severed from the ground, Wares, Merchandize, Carts, Plows, Coaches, Saddles, and such like moveable things.

More doubtful Cases touching things Personal.

FIrst touching things living. If the Testator had any tame Pigeons, or Deer, or Conies, or Phesants, or Partridges; these as well as Chickens, shall go to the Executors: so, though not tame, if they were taken and kept alive in any Room, Cage, or like Receptacle, as Phesants and Partridges often be; so Fish in a Trunk, as also young Pigeons, though not tame, being in the Dove-House, not able to fly out; yet their Dams, the old Ones, shall go to the Heir with the Dove-house. And if the Testator had any reclaimed Hawks, they also as Chattels personal shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Grey-hounds and Spaniels be not so commonly bought and sold, nor so anciently have been; yet are they now grown to be a

10 *E.*4.14, 15. Come of wild Ones, 22 *H.* 7. Kelw. *Rep.* 88. 118. Co. 1. *l.* 11. *f.* 50. 18 *H.* 8. 2.

10 *E.*4.14, 15, and 18. So of young Hawks in the Nest. It is Felony to steal these; *ergo*, they be goods.

Merchandise, and why not? For although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as Instruments of Musick, both tending to delight and exhilarate the Spirits; a cry of Hounds hath to my sense, more spirit and vivacity than any other Musick. Add hereto, that there may be some profit and advantage gotten by them, both *quoad adeptionem boni, & adeptionem mali*, the getting of some good Food, and the preserving of others, as Lambs, Conies, Fish, Poultry, by killing Foxes, wild Cats, and others, which destroy them. And we know that Mony is recoverable in Damages for taking away such, or a Mastiff serving to keep an House; so of Ferrets to catch Conies, &c. Therefore they are valuable. But it may, perhaps, be objected, that none of these above are Cattel, and therefore not repleviſable, consequently, no property in them; for when more than one living Cattel is distrained, the Replevin is to be by the name of *Averia*, signifying Cattel. For answer, not to insist that one may have property in divers things whereof no Replevin lieth, as Corn or Hay not in Sacks nor Carts,

So an Hunter's Horn, a Faulkner's Lure.

Hares, Deer, Pheasants, Partridges, wild Ducks, &c. are good Meat.

Carts, Money not shut in Bag nor Box, &c. I further say, that even the word *Averia* may be applied to these: for so I find to Hens and Capons in the Book of Entries, *viz.* in the Writ of *Curia claudenda*, where the Plaintiff complains of the Defendant's not making his Mounds, *per quod Averia ipsius A. viz. Capones, Gallinæ, & alia Averia ipsius A.* that is, whereby his Cattel, *viz.* Capons and Hens and other his Cattel came into the Plaintiff's House and Garden to his damage, *&c.* And both *Newport* and *Newdigate* held that a Writ of Replevin lieth of such things. Though *Brudenel* were of contrary opinion, yet he also held an Action of Trespass maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first to those abroad in the Fields. Put the case that a Man dies in *July* (before Harvest I mean) seised for Life, or in Fee or tail, in his own right or his Wifes, or estated for years of Land in the right of his Wife, being sown with Corn or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this shall go to the Executor of the Husband, and not to the Wife or Heir, who shall

Fol. 142.

Hen. 8. *f.* 3.

have the Land, but Hay, growing, *viz.* Grass ready to be cut down, Apples, Pears, and other Fruit upon the Trees, shall go to the Wife; as also if they had been upon a Man's own Land of Inheritance, they should go to the Heir, though the Corn should go to the Executor. The reason of difference is, because this later comes not meerly from the Soil without the industry and manurance of Man, as the other do: and I take Hops, though not sown, if planted, and Saffron and Hemp, because sown, to pertain as Corn to the Executor. All those yet shall pass to one to whom the Land is sold or conveyed, if not accepted, though never so near reaping, felling or gathering. But what if the Wife had the Lease for years, as Executor to some former Husband or other Friend, and the Husband after sowing dies? who then shall have the Corn? Certainly the Corn shall go to the Executor of the last Husband, at least so much as is more than the years value of the Land, or the making it up by addition of other things; for the value is to be *Assets* for payment of Debts and Legacies. Put the case again, that the Husband and Wife were Joynt-Tenants of the Land; then

Roots of Carrots, Parsnips, Land sown whereon is ripe Corn.

For he was Tenant for life in effect

then the very Corn growing ſhall ſurvive to her together with the Land; and though the Husband ſowed it, yet ſhall it not go to the Executor. Being in conſideration of things growing on the ground, let us not forget to think of Trees ſold by *J S* ſeiſed of the Inheritance of the Land to *J D*, who dieth before felling; this Intereſt is a Chattel, which ſhall go to the Executor, and not to the Heir of *J D*: but ſome colour may be that theſe, becauſe fixed to the Soil and Free-hold, are real Chattels, as the Intereſt in Land is, and not perſonal. So alſo of Trees accepted by him who ſelleth the Inheritance of the Land. But in both Caſes I conceive this Intereſt to be perſonal, and not real; for that, as it is a propriety of Chattel in the Vendee or Vendor with exception, it ſtands in conſideration ſevered and abſtracted from the Soil or Ground where the Trees grew, though the Trees be not actually ſevered by the Axe from their Mother Earth. But if the Leſſor for years or life do except the Trees, theſe continue parcel of the Free-hold and Inheritance. And after Corn reaped, and before the Tithe ſet out, the Inheritor of the Tithe dying, I think the

The Wife alſo ſhall have convenient apparel. 33 H. 6. 31. 2 Eliz. Dyer.

Co. li. 1. 38.

Executor, and not the Heir ſhall have the Tithe after ſet out.

Now let us come home to the Teſtator's Houſe, and ſee in and about it. Some doubt what pertains to the Heir, and what to the Executor. Queſtion hath been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rails, Glaſs in Windows, Tables, Dormants, Wainſcots, Doors, Locks, Keys, and ſuch like, to whom theſe ſhould go, whether to the Heir or Executors. And in the later end of *Henry* the ſeventh his time, an Executor taking a Furnace which was ſet in the middle of a Houſe, and not fixed to any Wall, the Heir brought an Action of Treſpaſs againſt him for ſo doing, and it was adjudged for the Heir, *viz.* that this was to go as part of the Free-hold and Inheritance to the Heir. And long before, in *Edward* the third his time, it was debated, whether it was waſte in a Leſſee to remove or take away a Furnace, or not: But I find no opinion delivered by the Judges. But in the late Queens time, Juſtice *Walmſly* ſaid that the Lord *Dyer*'s opinion was, That where the Furnace is not fixed to the Wall,

Of Houſes, or things about the Houſe, 43 E. 3. 6.

21 H. 7. f. 21.

42 E. 3. f. 6.

Wall, the Leſſee might within his Term take it away, Contrarily, if it were fixed to the Wall; for then it ſtrengthneth the Houſe. And yet, notwithſtanding it might be in the one Caſe ſo removed by the Leſſee, yet it is not there, as he ſaid, a Chattel perſonal or moveable, ſo as it is attachable. And there the Caſe being, that a Clothier being a Termer of an Houſe, had fixed a Copper to the Wall, with Looms and Bricks neceſſary for his Occupation; a Judgment being had againſt him, the Sheriff delivered the Copper in Execution as a Chattel, and after the Leſſee took it up, and it was taken from him by vertue of the Execution: whereupon he brought an Action of Treſpaſs, and by all the Judges the Action was maintainable. And whereas it was found by the Jury, that by the Cuſtom of *Kent* the Leſſee might remove ſuch a Copper; Juſtice *Beaumont* ſaid, that without any Cuſtom, a Leſſee might ſo do at any time during his Term. But it is to be noted in the ſaid Caſe, that the Furnace was by it ſelf delivered as a moveable Chattel, and not as part of the Houſe; for that was not medled withal, nor at all delivered in Extent, (as

H. 37 Eliz. Auſtin's Caſe.

in the Case between *Miles* and *Prat*, where both House and Copper were delivered upon a Statute) the House belike being held upon such a rack-rent, as that the party did not desire to have it, for he might have had the whole, being a Chattel, and so have used the Copper during the Term. And as touching all other fixed things, the Law was taken in the said Case in *H.* 7. his time to be all one as in the case of the Furnace, *viz.* that they should go to the Heir, save only that for Glass in the Windows, *Pollard* said it was otherwise, *viz.* that that should go to the Executors, which none there denied. But since, in the late Queens time it was otherwise resolved touching Glass, that it should not go to the Executors, and the like was there said touching Wainscots, and so also by the Lord *Anderson* in the said Case of *Austin.* And touching Posts fixed, for that they be parcel of the Free-hold, so also of Mill-stones, Anvils, Doors, Keys, Windows, none of these be Chattels, but parcel of the Free-hold, or thereto pertaining, therefore not the Executors.

Co. *lib.* 4. *fol.* 93, 94.

Things in Gardens.

Now to come to Gardens also: whereas I before laid down a difference be-

betwixt things ſowed, or not ariſing from the Earth without manuring; and ſuch as grow of themſelves; it will thence be concluded that the Roots of Carrots, Parſnips, Turnips, Skerrets, and ſuch like, coming and ariſing from yearly ſowing, muſt go to the Executor, and not to the Heir; the caſe being ſo, that the Gardner and Sower had the Inheritance of the Garden or Soil. Now though in moſt places this can rarely be a queſtion of value, yet about *London* and ſome great Towns it may, and therefore is not unworthy of a line or two, a thought or two, the rather for that the reaſon of this Caſe may give light touching right in other Caſes. And, in my opinion, theſe (notwithſtanding there is a ſowing and manurance to generate them and cauſe their being) ſhall go to the Heir, and not to the Executor. My reaſon is, for that the thing of profit is the Root which is hidden in the ground, I hold it no reaſon, nor agreeable to the Law, that the Executor ſhould dig and break the Soil and Ground to ſearch for her entrals: he is to content himſelf with that which is above ground, as Melons of all kinds, and the like, whoſe fruit is above the ground; but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the Soil, therefore they shall go with it to the Heir.

Let us now consider of things, though not fixed to, yet usually kept in Houses, *viz.* Writings and Evidences, whereabout generally no doubt can be, but that they follow the interest of the Land: so as if they touch Inheritance, they pertain to the Heir: if but Terms of years, Goods, Chattels, or Debts, they pertain to the Executor: yea, so do Statutes and Bonds in Law, (howsoever otherwise in equity) though they concern the assurance and enjoying of Inheritance purchased. What if *A* mortgage the inheritance of Lands to *B*, upon condition of Redemption by payment of five hundred pound to *B*, his Heir or Executor, and *B* dieth, the Deed being delivered into his hands? now the Heir, not the Executor, shall have them: for though the Mony may be paid to the Executor, yet (meantime) the Land descends to the Heir, nor is there any Debt to the Executor, for *A* may chuse to pay, or not. Put it

on

on the other ſide, that the Land had been ſold for five hundred pound not paid to *A*, but a Condition, that if not paid to him, his Heir or Executor, by ſuch a day, then to re-enter; and *A* dieth: here is a Debt to the Executor, and no Land deſcended to the Heir of *A*, yet ſhall the Heir have the Deeds, for that a Condition is deſcended to him. Queſtion hath been touching Boxes and Cheſts wherein the Evidences concerning Inheritance are: and although the better opinion in our Books doth pitch upon this difference, that where they are ſealed up, they ſhall pertain to the Heir, otherwiſe, where not ſealed; I cannot conceive that difference to be grounded on good reaſon, but rather think that Boxes which have their very creation to be the Houſes or Habitations of Deeds, ſhould, as appurtenant to them, go to the Heir, whether ſealed or not. On the other ſide, Cheſts made for other uſes, *viz.* the keeping of Napery or Apparel, ſhall not, as I conceive, be taken as appurtenant to Evidences becauſe ſome be in them, for ſo may other things alſo be: Nor as touching them can ſealing be of any effect, but rather locking and not locking

41 *E.*3.2. 36 *H.*6.26. 18 *Ed.*3.4. 3 *H.*7. 15.

Que. If ſole uſe that may make a difference or not.

locking muſt make the difference touching them, if any difference by incloſure.

CHAP. VI.

Of things not actually in the Teſtator, but accruing to the Executors by or after the Teſtator's death.

THeſe be of divers ſorts: the firſt and chief whereof are things gotten and acquired by Action or Suit; ſecondly, by Condition or Covenant without Suit; thirdly, by Remainder.

Of things in Action.

TO ſpeak firſt of the firſt, it is clear that Debts due to the Teſtator, be it by Bond, Statute or Judgment, or for Arrerages of Rent, are not *Aſſets* to charge the Executor until receipt of them: and it is clear that the Action to recover theſe doth pertain to the Executor, and that the Debt and Damages recovered ſhall be *Aſſets* to charge the Executor. So alſo of Actions of *Detinue* and of

of Covenant for any thing perſonal, or any Chattel real, Leaſe, Wardſhip, or the like. But perhaps ſome will doubt of Covenant touching Inheritance, *viz.* the aſſurance of Lands, or enjoying thereof free from this or that incumbrance, or the like: Yet even in thoſe caſes, if the Covenant were broken in the Teſtator's life-time, I think clearly the Action is accrued to the Executor, for that his Teſtator was to recover damages in the Action of Covenant for that breach; and he being intitled to theſe damages as principal, and not any acceſſary thing in that Action, the Law hath caſt that Action upon the Executor. And that is the cauſe why, if Waſte be committed in the life of the Leſſor by his Leſſee, and then the Leſſor dieth, his Heir can have no Action for this Waſte, *viz.* becauſe he cannot recover the treble damage; ſo neither can the Executor have it, for that he cannot recover *locum vaſtatum*, the place waſted, the Inheritance whereof is in the Heir.

A Church of the teſtat. Inher. become void in his life comes to the Exec. as a thing in Action; but is not *Aſſets* for not vendible.

That the Executor at the Common Law could not maintain an Action of Treſpaſs for Goods of his Teſtator taken away in his life-time, ſeems to be implied by the Statute in the time of K. *Edward* the

11 *H.*4.32. 45 *E.*3.3. *No.ma.br.*59. 4 *E.*3 *c.*7.

And the like given to Executors of Executors *per Stat.* 25 E.3.c.5. 17 E.3. Fit. 106.

the third, which gives such Action. Yet it seems that a Replevin was maintainable by the Executor, at least in some cases, for Goods taken or distrained in the Testator's life-time. But in case the Distress were for Rent or Service, it is said a little after making of that Statute, that the Lord may not now avow for his Rent or Servicce, because his Tenant is dead, but must set forth the matter, and thereupon justifie to excuse himself from answering damages; and the Executor shall by this Action recover the Cattel or Goods, and that by the Common Law, saith the Book, though the Statute of *Marlebridge* had never been made, for that the propriety remained in the Testator. Note, it speaks not at all of the said Statute of 4 *Edward* the third. But *Newton* in the time of King *Henry* the 6. would have it, that the Executor in that case should not have a Replevin, but an Action of Trespass grounded upon the said Statute, *viz.* 4 *Edw.* 3. which methinks cannot be by any means, by reason of the Statute of *Marlebridge*, cap. 3. *Non ideo puniatur Dominus*, &c. for the Executor, as well as his Testator, is thereby restrained, as I think, from the Action

*C.*21. meant *ut credo.* 21 H.6.1. But *Markham é contra.*

21 H.8.c. 19. 4 E.3.

on of Treſpaſs againſt the Lord. As for that no Avowry can be made upon the Tenant, that is now remedied by a late Statute. The other Statute hath been taken to extend to other things than Goods moveable: for where a Church becoming void, a Stranger preſented thereunto wrongfully, and the Patron died; it was reſolved in the late Queens time, that the Executor might by the equity of the ſaid Statute maintain a *Quare Impedit*. But whether an Action of Treſpaſs lieth for an Executor againſt him who ſpoiled the Teſtator's Corn, Graſs or Wood growing, hath been queſtioned, but nowhere reſolved to my knowledge. I think it may lie with ſome difference. Firſt, for that the Statute of 4 *Edward* the third doth not only ſpeak of Goods carried away, as limiting the Law to that Treſpaſs ſolely and particularly, but ſpeaks generally of Treſpaſs done to Teſtators; and then brings in that particular of Goods, as one Inſtance. Now there be many Caſes of inſtances or enſamples given in Acts of Parliament, which yet do not reſtrain the remedy or purview to that particular, or from extending to other Caſes of like nature.

The B. of *Coven.* & *L.* and *Sale's* Caſe *M.* 32 & 33 *El.* in *Com. Ban.* So of Raviſhment. *Pl. gard.* 7 *H.* 4. 2. & 7 *H.* 4. 6. *Eject. Firm.* & *Tild. De clauſo fracto* meerly it lieth not. 11 *H.* 4. 3. This *Periam* Juſt. did very judiciouſly urge in *Sale's* Caſe *ſupra.*

ture. Thirdly, the Stat. ſpeaks of Treſpaſſes remaining unpuniſhed, which it meant to redreſs: But it ſhould ſtill leave many unpuniſhed, if it ſhould have no larger extent than to that one ſingular Treſpaſs of Goods taken away, *viz.* moveables. Again, the Teſtator was clearly entituled to a recovery of damages for this other Treſpaſs, which if he had recovered, ſhould have come to his Executor: Yea, the things themſelves, all, if felled in the Teſtator's life, and part, though not felled, ſhould have come to the Executor; therefore all the damages recoverable in lieu thereof, out of which (recovered) the Debts and Legacies of the Teſtator are to be ſatisfied. Beſide, this Action of Treſpaſs is a thing ſevered from the ſtate of the Land, ſo as if the Owner thereof had, after this Treſpaſs done, alienated the Land, yet had not this Action remained to him, as I take it clearly. And why not as well as where a Treſpaſs is done upon the Lands of the Leſſee, and then the term expires? This doubtleſs doth not take away his Action, nor his Executors. But methinks here may be ſome differences probably taken: as firſt, between a Treſ-

paſs

paſs in deſtroying or taking away Corn growing, and a Treſpaſs in Graſs or Wood growing. For the firſt being of that nature, as that, though the Owner had a ſtate of Inheritance in the Land whereon it groweth, and ſhould have died before ſeverance and felling, yet it ſhould have gone to the Executor, and not with the Land to the Heir; therefore doubtleſs doth the Action for deſtroying or taking away thereof accrue by the operation of Law to the Executor, in lieu of the thing taken or deſtroyed. Otherwiſe, perhaps, of Wood or Graſs, which by the Owner's death ſhould have gon to the Heir, and not to the Executor. And yet here again another difference, methinks may be betwixt Graſs and Graſs, *viz.* betwixt that in Paſture and that in Meadow, yearly mowed and turned into Hay, not left to be conſumed by the mouths of Beaſts, as that growing in Paſture: For as the Law diſtinguiſheth between theſe Soils, it gives precedency to Meadow, and makes it waſte for a Leſſee to plow it up, not ſo for Paſture. Yea, Tithe is paid of Hay, but not of Graſs growing in Paſtures; ſo the Meadow-graſs, being in the Owner's pur-

pose and intention as a thing severed from the Soil, should methinks, so be also in the eye and estimation of the Law, and therefore stand in a different state and account from Pasture-grass.

A third difference may be in the manner of the Trespass, *viz.* Where Meadow-grass is eaten up with Cattel by a Trespasser, and where by him mowed and carried away as Hay: for in this later case an Action of *Trover* and *Conversion* for so many Loads of Hay is doubtless maintainable by the Executor; though it should be admitted that in the other case, of Consumption by the Mouths of Beasts without severance, no Action should be maintainable by the Executor; which yet I admit not, but think the contrary probable.

For when Meadow-ground, which yearly conceiveth, (*Sol sine homine generat herbam*) shall be ready to be delivered of her burthen, if a Stranger put in a Herd of Cattel, which swallow up and tread down this fruit of her Womb before the Mower with his Sithe come as a Midwife to help her delivery, if then by the hasty death of the Owner, before Action brought, this great Trespass should be dispunishable, it

At least, methinks, Action upon the Case here and before should be maintainable.

were

were contrary, as methinks to the purpose of the said Statute, and a great defect in the Law.

Yet here, perhaps, touching this a fourth difference may be or arise out of the time of the death of the Owner, *viz.* where he died before time of Mowing, and where not; for *dato* that in the former case, because, if such destruction or consumption had not been, yet the Owner dying before severance, this should not have come to the Executor, but have gone with the Soil to the Heir, that therefore the Executor who is not damnified, should recover no damages: yet in the other case the Owner living till after Hay-time clearly passed, *viz.* till the end of *August*, methinks now, since this fruit of the Meadows Womb should have been a Chattel severed, had not this Trespasser made unlawful prevention; therefore the Executor to whom the same should have come towards the performance of the Will, should have out of the said Statute, an Action and remedy reached unto him to recover recompence in damages for this wrong done *in retardationem Executionis Testamenti.*

A fifth and laſt difference may perhaps be in the ſtate of the Owner: for *Poſito* that where the Land is his Freehold or Copyhold Inheritance, no Action ſhould be given to his Executor for Wood or Graſs taken or deſtroyed in his lifetime; yet where he is but Tenant for years, Gardian, or Tenant by extent, ſo as the very ſtate in the Land was to come and is come to the Executor, (together with *quicquid plantatur ſolo*) methinks the Executor ſhould have, together with the ſtate in the Soil, the Action to puniſh the Robber of, or Treſpaſſer upon the Soil. Thus having ſcanned and ſifted to the beſt of my ability, all differences and circumſtances of this Point, how far I am wide and wherein right *Aliorum ſit judicium*, or rather, *Altioris eſto judicij*. But this is clear, that whereſoever Executors do recover any damages for Treſpaſs or other wrong done to their Teſtator, the Mony recovered (at leaſt if Execution be had, or Mony received) will be *Aſſets* in their hands, as well as Debts recovered upon Bonds, or Bills, or Lands by them taken in Extent upon Statutes, Recognizances or Judgments. Yea, without ever having theſe Monies, Executors may

3 H. 6. 3. Littleton, f. 48. a. So held in *Sale's* Caſe of damages in *Qua. Imped.* recovered. *Contr* of the Preſentment, Releaſing. 13 *Ed.* 3. *Tit.* 91.

make

make them *Aſſets* in their hands, *viz.* by making Releaſes or Acquittances, or acknowledgment of Satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors with the whole penal ſum, though haply they receive but part, as the principal, or ſome like proportion.

Therefore there is great caution to be uſed by Executors in this kind, that unleſs they be ſure they have Goods ſufficient to pay all Debts and Legacies, they make no Releaſe, Acquittance, or Acknowledgment of ſatisfaction, for more than they receive, be it Debt or Damages.

And the like caution is to be uſed by them touching ſubmiſſion of Debts or Damages to Arbitrement, whereby diſcharges of the ſame may grow: for the ſubmiſſion to the Arbitrement being their voluntary act, although the Arbitrators by their Judgment do diſcharge the Debt or Damage in part, or in whole; yet ſhall the Creditors have like remedy thereupon againſt the Executors as if they had releaſed, or, which is more, received the ſame.

Error 13 *H.* 4. 6. 46 *E.* 3. Yet upon a Verdict in *Quæ. Imped.* the Wife, not the Executor of of the Husband did ſeiſe.

Other Actions there be of Diſcharge, which as the Teſtator himſelf in his life-

9 *H.* 6. *c.* 4.

time might have had, ſo may his Executor after his death, *viz.* Writ of Error, Attaint, Diſceit, *Audita Querela*, *Identitate nominis*. But this laſt is given by Statute. Whatſoever is regained by any of theſe ways as unduly loſt by the Teſtator, ſhall alſo be *Aſſets*.

Special Caſes pertinent to the Premiſſes.

1. *Chattels come to the Executors from the Teſtator, are not* Aſſets.
2. Aſſets *which be no Chattels.*
3. *Things in Action, and in the Perſonalty, turned into Chattels real, &* è contra.

AS to the firſt, I exemplifie thus: *A* makes *B* his Executor, and dies; *B* makes *C* his Executor, and dies: the Goods left by *A* to *B* as Executor far exceed his Debts and Legacies. Or let us ſuppoſe no Debts nor Legacies of *A*, and that *B* dieth much in debt above the Goods he leaveth, and did make no alteration of the property of the Goods of *A*, but meerly left them to *C* his Executor.

Now ſhall not the Goods which came to *B* as Executor of *A*, and ſo from *B* to *C*, be liable in Law to pay the Debts of *B*: yet in Conſcience methinks they ſhould, and that *C* ſhould not receive them to his own uſe, as in Law he may, where *A* left no Debts. But if *A* making *B* Executor, did alſo by his Will give him all his Goods, and he in his life-time made election to have them as Legatee, or by his Will did ſo diſpoſe of them, or appoint them to go, as the Goods he had as Executor; they could not be otherwiſe given or diſpoſed. Now by this election they were altered in property from being his as Executor, and ſo as his own Goods ſhould be liable to his Debts. But things in Action could not be ſo given or diſpoſed, *viz.* Debts, *&c.* Yet if *D* were indebted to *A* one hundred pound, and *B* his Executor took new bond of him, or another for it, giving up the old Bond; now was it become his own Debt, and ſo ſhall ſtand in his Executor.

Another inſtance of this, thus: If *A*, Patron of the Church of *D*, grant to *B* the next Avoidance, the Church becomes void, *A* dies before he preſents, his Executor preſents, and hath the benefit

Or if a ſtranger uſurp in his life, and he dying, his Executor

recovers in a *Qua. Imp.* as by *Sale* was done *Infra. Mich.* 32 & 33 *Eliz.* So held in *Sale's* Caſe, in *Com. Ban. vendere jure poteſt, emerat ipſe prius.*

of preferring his Son or Friend; yet ſhall this make no *Aſſets* in his hands for payment of Debts, for that he could not lawfully take Mony to preſent. But if *B* had died before the Church had become void, then, becauſe the Executor might lawfully have ſold it, the value ſhould be *Aſſets* in his hands, as I conceive; except perhaps the Incumbent had died ſo haſtily after *B*, that the Executor had not time convenient to find out a Chapman and to ſell it.

If in the other Caſe a ſtranger had preſented, and got his Clark admitted, and the Executors of *B* had in a *Qua. Imp.* recovered damages; the Mony ſo recovered ſhould have been *Aſſets*. Thus much of the firſt, *viz.* that ſome things of the nature of Chattels may come to Executors, and yet not be *Aſſets*.

Touching the ſecond, *viz.* that ſome things may be *Aſſets* in the hands of Executors which yet are no Chattels, I ſhall give but two inſtances. Firſt, where a Man leaveth a Villain for years to his Executors, and the Villain purchaſeth Land in Fee-ſimple, and the Executor entreth into the Land; now hath he Fee-ſimple therein, and this Land is

22 H. 8. Br. *Villainage* 46 If he die now ſhall this be *Aſſets* in the Heir?

Aſſets

Aſſets for payment of the Teſtator's Debts. So if a Man by his Will give Lands in Fee to his Executors to be ſold for performance of his Will; theſe (before the Mony thereby raiſed) are *Aſſets* both for payment of Debts and of Legacies. But if the Lands had been given to be ſold only for payment of Debts, they ſhould only be *Aſſets* for that purpoſe, and not for payment of Legacies: and ſo if it were expreſſed to be for payment of Legacies ſingularly, this ſhould not be *Aſſets* for Debts, as I take it. For ſince theſe are not *Aſſets* of their own nature, but ſo made by the Will and diſpoſition of the Teſtator; methinks they cannot be otherwiſe nor farther *Aſſets* than as the Teſtator hath willed and diſpoſed. But though Lands thus given were *Aſſets* before the Stat. 21 *Hen.* 8. *cap.* 5. yet how can it be ſo, ſince the very words of the Statute be, that if one do Will by his Teſtament or laſt Will any Lands, *&c.* to be ſold, neither the Mony thereof coming nor the Profits taken ſhall be accounted as any of the Goods or Chattels of the Teſtator's; which I conceive to be all one as to ſay, that they ſhould not be *Aſſets*? For

3 H. 3. 63. and ſo 4 H. 4. 21. If by Feoffment. *Per* Markham *cepit Juſt. cont.* Rickhill.

See 9 Eliz. Dyer 234.

For when an Executor denieth himſelf to have *Aſſets*, the form of his Plea is, *Quod nulla habet bona nec catalla*, &c. Yet ſince that Statute, *viz.* in the late Queens time, the Law was twice admitted or conceived ſtill to be according to the third of *Hen.* 6. *viz.* that the Land deviſed to be ſold, or the Mony thereof coming, ſhould be *Aſſets*. Indeed in neither of thoſe Books is there any mention of the clauſe in the ſaid Statute; and it is poſſible that it might be forgotten, as in other Caſes ſometimes hath happened. But caſting about how to reconcile thoſe Books with the ſaid Statute, and not to ſuppoſe the ſame forgotten at both times, both at the Bar and Bench, (though, being but a ſhort clauſe in the midſt of a large Statute to other purpoſe, it might well ſo have been) at the laſt, though not haſtily, I grew to conceive, that the ſaid Clauſe being in an Act which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the Goods of the deceaſed, and then bringeth in this Clauſe, that the Lands willed to be ſold ſhall not be accounted as any of the Goods, *&c.* the Parliament meant thereby only to exclude

9 H.D. 264.
14 H.D. 35.

clude them to this purpoſe, that they ſhould not be accounted as part of the Goods in the valuation, according to which the ſaid Fees were to be rated; and though the words be general, that they ſhall not be accounted as any of the Goods, *&c.* yet it is the more probable that the Parl. intended no farther than as aforeſaid, becauſe that Clauſe, after the Fees limited in anſwerableneſs to the values, is brought in by a *Proviſo*, *viz.* Provided always, that if the deceaſed willed any Lands to be ſold, the Mony nor Profits ſhall not, *&c.* And thus perhaps it was underſtood and conſtrued in the ſaid late Queens time; though no mention be of any remembrance of that Clauſe or Proviſion in either of thoſe Caſes reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the Perſonalty into the Realty, *& e contra*, I ſhew it thus: If a Debt were due to the Executor as Executor, by Statute, Recognizance, or Judgment, and he ſue Execution, and have Land of the Debtor's in extent; now is the perſonal duty turned into a Chattel real. On the other ſide, if ſuch an Eſtate by Extent, or a Leaſe for years mortgaged,

mortgaged, come to an Executor, and the Debtor or Mortgager payeth the Mony due: now are theſe real Chattels turned into *Aſſets* perſonal.

Another ſpecial Caſe of Equity oppoſing Law

IF *A* be bound to *B* by Bond, Statute or Recognizance, for aſſurance of Land, *B* dieth, and the Land deſcends to his Heir; or be it that *B* ſold the Land to *C*, and aſſigned to him the Bond, Statute, *&c.* yet muſt the Suit or taking out be in the name of the Executor of *B*, and neither of the Heir or Aſſignee. And that which is recovered or gotten in Extent will be *Aſſets* in Law to charge the Executor, as I take it; yet in Equity it pertains to the Heir or Aſſignee. *Quære*, if the Executor meddle not, but only ſuffer his name to be uſed.

Of things come to Executors by Condition.

FIrſt we will conſider of Conditions for bringing back to Executors Goods or Chattels granted away by their Teſtators. Touching which there is no doubt, but if the Condition be any other than for payment of Mony, or other things valuable

valuable by the Teſtator or his Executor, the Chattels returning to the Executor are *Aſſets* in his hands: as put the Caſe a Leaſe for years, Horſes, Sheep, Plate, or other Chattel, were granted by the Teſtator to *A*, upon condition that if *A* did not pay ſuch a ſum of Mony, or do ſuch other Act as the Teſtator appointeth, *&c.* and this Condition is not performed after the Teſtator's death; now is the Chattel come back to the Executor, and is *Aſſets.* But the queſtion hath been, (and perhaps may be) where the Condition is, that the Teſtator or his Executors ſhall pay the Mony to make void the Grant, and accordingly the Executor after the Teſtator's death payeth the Sum out of his own Purſe, not having any Mony of the Teſtator's in his hands: in this Caſe coming in queſtion *tempore Hen.* 7. it was reſolved at the laſt, that this redeemed Chattel ſhould not be *Aſſets*, but be to the Executor as his own proper Goods; though at the firſt three Judges were of contrary opinion, *viz.* that the Goods redeemed ſhould be in the Executor as Goods of the Teſtator. And truly I muſt confeſs, that I cannot yet find good ſatisfacti-

Note diff.

21 *H.* 7.

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on in that Books reſolution, except we ſhall take the caſe there to be ſuch as that which is put and reported by the Lord *Dyer*, *tempore Hen.* 8. *viz.* that the Mony paid for redemption was as much as the full value of the Goods pledged or mortgaged; or elſe ſhall admit the Caſe to be, that this redemption was not by payment at the day conditioned. As to the firſt, it were rare if any ſhould lend Mony upon a Mortgage, where the thing mortgaged is not of better value than the Mony lent; rare alſo that an Executor ſhould take care to redeem with his own Mony that which ſhould yield no benefit or advantage to him, or his Teſtator. Let us therefore ſcan and examine the Point, ſince the ſame may come frequently in uſe: and this we may the more decently do, becauſe the Lord *Dyer* in the Margin of the Caſe by him reported, as aforeſaid, ſaith expreſly, that the ſaid other *temp. Henry* the ſeventh was not at all adjudged, himſelf having viewed the Roll, which he there ſets down, and the names of the parties. We will therefore put the Caſe thus: *A* poſſeſſed of a Leaſe for ſixty years of one hundred pound

Land

Land mortgageth it for five hundred pound; or be it that the Mortgage or Pledge be of a Jewel or piece of Plate for half the value; and now before the day limited for payment and redemption, *A* having made *B* his Executor, dieth, and *B* at the time and place maketh payment as was conditioned: Now the queſtion is, whether this Leaſe, Plate, or Jewel, being worth much more than the Sum for which it was mortgaged, ſhall be in him wholly in his own right and to his own uſe, or partly, if not wholly, as Executor to *A*, ſo as to be ſubject to the payment of Debts and Legacies. Here it muſt be clearly admitted, that *B* was enabled to this redemption only and meerly by the Condition annexed to the Mortgage or Pledging. It muſt alſo be admitted, that this Condition, and the power or intereſt to take benefit thereof, came to him and was derived only as Executor of *A*. This being premiſed, it muſt needs follow, (as to me it ſeems) that the Condition working and having his operation in the redemption to deſtroy the Grant, Mortgage, or Pledging, it muſt needs make theſe things again the Teſtator's Goods *in*

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ſtatu quo prius, and ſo to be in *B* as Executor; ſince in that right only he was intituled to take benefit of the Condition. For what is it which hindered, before this, from being the Teſtator's Goods? nothing certainly but only the force and ſtrength of the Mortgage or Pledge. Now by the Redemption that is become void, and hath loſt its force; therefore the property of theſe things muſt now needs be as if no ſuch Mortgage or Pledge had been, or as if it had at the firſt been void and of no force. Thus muſt the Condition work for him who made it, *viz.* *A* the Teſtator: and thoſe of the contrary opinion in the time of King *Henry* the ſeventh do yet ſay, that by this Redemption the Teſtator is ſo much indebted to the Executor as he diſburſed for the Redemption; which could ſtand with no reaſon, unleſs by it the property and intereſt ſhould be reduced to the Teſtator's behoof. That thus it is, is alſo proved, as to me it ſeems, by the Caſe of Mortgage of Inheritance, upon which the Heir making payment, according to the Condition, is not now in as a new Purchaſer, but as Heir,

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ſo as he ſhall have his Age, and be in Ward even for this Land; yea, it ſhall be *Aſſets* in his hands for ſatisfaction of his Father's, as other Anceſtors Debts: which in ſome reſpect is a harder Caſe than that of the Executor; for he hath means to ſatisfie himſelf of the Mony disburſed, either out of the thing redeemed, or other Goods of his Teſtator, but the Heir hath no ſuch means. Yet it will be asked, how the Executor can be free from miſchief: for if this thing redeemed be intire, as the Cup or the Leaſe, the whole will be taken in Execution for the Teſtator's Debt. To admit this, yet here is one clear way of remedy, *viz.* The Executor may before ſuch Execution ſell the thing, and ſo pay himſelf, and retain the Surpluſage to the Teſtator's uſe; and the like of this is frequent in uſe, *viz.* for Executors to pay off the Teſtator's Debt with their own Mony, and to make themſelves ſatisfaction out of the Teſtator's Goods. Beſides, it is not impoſſible that this redeem'd thing ſhould be thus in intereſt parted, that anſwerably and proportionably to the Sum disburſed for redemption, with reference to the value of the thing redeemed, a moiety

or third part, or three parts thereof, ſhould be to the Executor in his own right, as his own proper Goods, and the reſt in him as Executor. As *poſito* that *A* and *B* were Tenants in Common of ſuch an entire Chattel: *A* maketh *B* his Executor, and dieth. Now hath *B* one moiety as Executor, and another as his own proper; and upon a Judgment againſt him as Executor, that moiety only which he hath as Executor muſt be taken in Execution. And here may be remembred, how in Execution of a Judgment, or levying of an Amerciament out of an entire Chattel of more value than the Sum to be levied, the whole is to be ſold, and the Surpluſage above the Debt or Amerciament is to be delivered back to the Owner. For in all this debate, we muſt preſume the thing redeemed by the Executor to be of better value than the Sum paid, elſe we may eaſily admit the whole to the Executor.

Again, the Leaſe for years is not ſo entire a thing, I mean the Land let, but that thereof Partition may be made, yea, enforced by Action, between Joynt-Tenants and Tenants in Common. But here will be objected the Caſe of Redemption by the

the Daughter and Heir, who though ſhe hath a Brother born after, ſo as now ſhe is no longer Heir, yet ſhe ſhall, as the Book ſaith, retain the Land redeemed from the Heir as a Perquiſite or Purchaſe. As for this, (which I will not oppoſe) the Law ſo framed to the favour of the Daughter, becauſe of great miſchief to her, if, being ſtripped of the reſt of the Inheritance by the birth of a Brother, ſhe ſhould alſo loſe that which her Mony had redeemed, without having any remedy to have her Mony again, or any recompence for it. But in the other Caſe there is no ſuch miſchief, for that the Executor may pay himſelf, as hath been ſhewed.

Now on the other ſide, if the Caſe ſhall be underſtood that the Redemption was by payment after the day, then will I eaſily admit that the property or intereſt is in the Executor to his own uſe; or that the Condition now having no power to reduce it back, or to operate any thing, it is rather a Re-emption than a Redemption, ſince it was at the Will of the Mortgagee to diſpoſe it at his pleaſure; and any Stranger, as well as the Executor, might thus have re-

deemed, *viz.* repurchaſed it: therefore only Equity, and not Law, in that Caſe can make any part of the value *Aſſets* in his hands. And ſo alſo, I think, if we ſhould admit in the other Caſe of payment at the day that the property of the Chattel is to the Executor as his own, and not his Teſtator's Goods, no part of Surpluſage of value can in Law be *Aſſets*, howſoever in Equity.

Laſtly, if the Executor redeem by payment at the day with the Teſtator's own Mony or Goods, none will doubt but that the thing redeemed is in him as Executor, and the Mony by him paid for Redemption is well Adminiſtred, the Goods redeemed being of better value. But this way it makes no difference whether the whole value of the Goods redeemed ſhall be held *Aſſets*, and the Mony paid for Redemption ſtand drowned therein; or that that Sum be ſtill adjudged in the hands of the Executor as *Aſſets*, and only the Surpluſage of the thing redeemed over and above the Sum paid for Redemption.

Things accrued by Covenant or Aſſumption.

IF *A* Covenants with *B* to make him a Leaſe of ſuch or ſuch Land by ſuch a day, and *B* dieth before the day, and before any Leaſe made; now muſt *A* make the Leaſe to the Executor of *B*, and the Leaſe ſo made to him ſhall be in him as Executor, and conſequently as *Aſſets*. This is proved by the Judgement in the Caſe between *Chapman* and *Dalton* in the late Queen's time. Yet I confeſs that it is not expreſſed in the Reſolution of this Caſe that this Leaſe ſhould be *Aſſets*, but that the Executors ſhould have the Term as Executors, which implyeth as much in my underſtanding; and the Declaration whereupon the Defendant demurreth ſets forth the breach of that Covenant to be *in retardatione executionis Teſtamenti*; ſo as the Damages thereupon recovered, *viz.* 330 l. were *Aſſets*, and conſequently alſo ſhould the Term have bin, in lieu and recompence whereof theſe Damages were given. The like Law, if *A* aſſume upon good conſideration to deliver in to *B* by ſuch a day 20 Quarters of Malt, or ſo many Loads of Coals

Plow. *Com.*

Coals or Wood, or any other Wares or Merchandiſe, and this is not performed in the life of *B*, but after to his Executor; it ſhall be to him as Executor, and ſhall be *Aſſets* in his hands, as well as the Mony recovered in Damages for not performing ſhould have been.

Of things accrued by Remainder or Increaſe.

IF a Leaſe be made to one for Life, the Remainder to his Executors for years, and he dieth; this will be *Aſſets* in the hands of his Executors, though it were never in the Teſtator, as was in the later end of the late Queen's time reſolved by three Juſtices, the Lord *Anderſon* only being of a contrary opinion: and there it was ſaid that *Cranmer*'s Caſe, wherein the contrary in effect was reſolved, was of little Authority, for that there were firſt two Judges againſt two, till after *Mounſon* changed his opinion, upon a conceit that there the Eſtate was by way of uſe, which could make no difference. Like Law, where a Leaſe for years is by Will bequeathed to *A* for life, and after to *B*, who dieth before *A*; although *B* never

never had his Term in him ſo as that he could grant or diſpoſe it, yet ſhall it reſt in his Executor as his Goods, and be *Aſſets*. As for a Remainder for years ſo in the Teſtator that he might grant or diſpoſe it at his pleaſure, no doubt can be thereof; though the ſame fell not in poſſeſſion to the Teſtator in his life-time, yet no ſcruple nor doubt can be but that this is *Aſſets* to the Executor, even whilſt it continues a Remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible.

Nor much of other nature to theſe are the Caſes where the Executor merchandizing with the Goods of his Teſtator maketh gain thereof. 11 H.6.35. *per* Babington.

So if the Sheep, or other Cattel of the Teſtator do breed, *viz.* bear Lambs, Calves, Colts, *&c.* after the Teſtator's death, even theſe which were never in the Teſtator ſhall yet be *Aſſets*; and ſo the Wool growing upon the Sheep after the Teſtator's death. But there is one Caſe worth the conſideration, and worthy of ſome doubt, as I think, and that is this: One leaveth to the Executor a Leaſe for years of Land worth 20 pound by the year, and the Executor,

keeping this in his own hands one year after the Teſtator's death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound ſhall be *Aſſets*, or only twenty pound? And the Caſe, ſimply thus put, ſhall be underſtood of an occupying and manuring without any ſtock of the Teſtator's; and then, if the Executor did ſtock it with his own Sheep or other Cattel, as he muſt have born the loſs by rot or death, ſo is it reaſon that, if the Manurance prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his induſtry, skill, and good Husbandry. But if the Teſtator's ſtock of Sheep and Cattel were (as of neceſſity, or for the better advantage of the Teſtator's Eſtate) continued upon the Leaſe-Land, then is it reaſon that the gain or loſs, whatſoever of them God ſendeth, do redound to the Teſtator's Eſtate. Like Law (as I think) if an Executor, finding that he cannot inſtantly after the Teſtator's death let the Leaſe, I, and near the value, ſhall therefore buy Seed-Corn, and hire the Plowing, *&c.* But it may be ſaid, that the Leaſe hath one entire valuation at the firſt upon the

Appraiſe-

Appraiſement. To this anſwer, Firſt, that the value upon the Appraiſement is not binding, nor much reſpected at the Common Law: If it be too high, it ſhall not prejudice the Executor; if too low, ſhall not advantage him: but the very value found by the Jury, when it comes in queſtion whether the Executor have fully Adminiſtred, or have *Aſſets* or not, is that which is binding. Next I ſay, that if a long Leaſe come to Executors of Land worth an hundred pound by the year, and no ſale is made thereof by the ſpace of a year or more; now the Term continuing of the like value as at firſt, it is no reaſon but this hundred pound raiſed the firſt year ſhould go towards the payment of Debts and Legacies, rather than any of them ſhould be unpay'd. Theſe things, I mean the knowledge of them, are uſeful two ways, *viz.* Firſt, to give light to Executors, to diſcern what unto them of right pertains: Next, to ſhew unto Creditors and Legatees what, and how far, things ſhall be *Aſſets*, that is to ſay, Goods to enable, charge, and bind Executors to pay Debts and Legacies. For whatſoever any of theſe ways cometh to the Executors from their Teſtator, or is

is recovered by any of theſe Actions, ſhall be in their hands *Aſſets*, the coſt and charges of recovering deducted.

CHAP. VII.

What manner of Intereſt an Executor hath in his Teſtator's Goods and Chattels, and how different from the Common Intereſt which they or others have in their own proper Goods.

THe Intereſt which an Executor hath (as Executor) in the Goods of his Teſtator is much different from the abſolute, proper and ordinary Intereſt which every one hath in his own proper Goods, as may well appear in and by theſe Points. Firſt, Although a Stranger take away theſe Goods, the Action of Treſpaſs for the Executor is of general form, *Quare bona ſua cepit*, calling them his Goods; whereas a Man outlawed in Debt, *&c.* or convict or attainted of Felony or Treaſon, forfeiteth all his own Goods, yet theſe which he hath as Executor ſhall not be forfeited. If a Villain be made Executor, his Lord cannot

24 E.3.f.35.

32 H.6.34.

not take theſe Goods, though he may take all the Villain's own Goods: and for taking ſuch Goods, or for a Debt due to the Teſtator, a Villain may ſue his Lord. Nay, if the Executor grant all his Goods, ſome good opinion hath been, that theſe which he hath as Executor ſhould not paſs; yea, the Lord *Dyer* ſo held in the late Queen's time, with this difference, *viz.* Where the Grantor is named Executor in the Grant, there the Goods which he hath as Executor ſhould paſs; but otherwiſe, if he be not named Executor in the Grant. And that this opinion is probable, will farther appear by that which followeth.

Lit. *tit.* Villeinage 41, 42. 10 E. 4. *fol.* 1. Yet 39 H. 6. *f.* 15. A releaſe of all Actions by an Executor extinguiſh Actions as Executor. But *Frowick* is againſt it in 26 *Hen.* 7. Kel. 64.

Secondly, The Executor cannot by Will give or bequeath the Goods he hath as Executor; and if he die Inteſtate, and Adminiſtration of all his Goods is committed to *J D*, yet hath he nothing to do with the Goods which the Inteſtate had as Executor to his Teſtator: Thus *all his Goods* reacheth not to his Goods as Executor.

Thirdly, Whereas a Mans Good's ſtand liable to the payment of his Debts both in his life-time and after; the Goods which a Man hath as Executor are not to be taken

See theſe ſo reſolved in Pl. *Com.* 5. 25. *inter Bransbury* and *Granthom*, P. 20 *Eliz.*

taken in Execution for his own Debts, either upon a Recognizance, Statute, or Judgment had againſt him. And if ſuch a one die indebted, leaving to his Executor much Goods which he had as Executor; theſe are not *Aſſets* in his hands liable to the payment of his Debts, but only for the payment of the firſt Teſtator's Debts or Legacies. Therefore a *Quo minus* brought by an Executor, ſhewing that he was not able to pay the King's Debt, becauſe the Defendant detained from him an hundred pound, which he owed him as Executor to *J S*, was overthrown; for that it could not be intended, ſaith the Book, that the King's Debt could be ſatisfied with that which the Plaintiff ſhould recover and receive as Executor. Whereas a Woman being poſſeſſed of any Chattels perſonal, *viz.* moveable Goods, all are deveſted out of her into her Husband by her Marriage, ſo as if he die, and ſhe over-live, they be not her's again, but her Husband's Executors or Adminiſtrators; and if ſhe die, all be the Husband's, without being Executor to his Wife. It is not ſo of the Goods which ſhe hath as Executor; theſe ſtill remain in and to her, if her Husband die: and

if

if ſhe her ſelf die, for that ſhe hath them as it were in another's right, *viz.* as ſhe repreſents the perſon of her Teſtator, her Husband ſhall not have them, if he be not his Wife's Executor, and ſo Executor to her Teſtator.

Laſtly, Whereas the Writ of Treſpaſs ſeems to make no difference between one's own Goods and thoſe he hath as Executor, that being a poſſeſſory Action or Suit grounded upon the Poſſeſſion; yet come to an Action of Detinue, which more taſtes and participates of the right, and there are they differenced: For where for my own Debt, when I ſue, the Writ ſaith, *debet & detinet*, *viz.* that the Defendant owes me and detains from me that Sum; yet when I ſue as Executor, the Writ ſaith not *Debet*, he doth owe me, but *Detinet* only, he detains from me, as admitting that he is not Debtor to me, though he ſhould pay me. And ſo where I am ſued as Executor, the Writ makes me not a Debtor, but a Detainer; otherwiſe, where in my own right I owe, and I am ſued for a Debt. Accordingly, where Judgment in an Action of Debt is given againſt one as Executor, it is not generally that the Plaintiff ſhall

This may be in his name only out of whoſe poſſeſſion the Goods were taken.

Co. l. 5. f. 31.

ſhall recover againſt him, but he ſhall recover of the Goods of the Teſtator; and therefore upon this Judgment no *Capias* lieth againſt him, to enforce him to pay by Arreſt of his Body, becauſe he is not properly Debtor. But if after it be returned, that he hath waſted the Teſtator's Goods out of which the ſaid Debt ſhould be ſatisfied, then, he having made himſelf a Debtor, a *Capias and ſatisfaciendum* ſhall be awarded againſt him, and then he ſhall be taken in Execution. So alſo in ſome Caſes of falſe Plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiff may have a *Capias ad ſatisfaciendum*; and that Judgment is in divers Caſes for the Damages, although not in many for the Principal. As for the *Capias* before Judgment, in the mean Proceſs againſt an Executor, that is becauſe of his Contumacy in not appearing upon the former Proceſs.

31 H. 6. 9.

The reaſon of this different Intereſt between an Executor and another, or between the ſame Man's having Goods as Executor and others in his own right, as alſo of the different manner of one's being indebted as Executor and otherwiſe in his own right, is well expreſſed by

by the Lord *Cook* in *Pinchon*'s Caſe, *viz.* Firſt, that the Goods which one hath as Executor he hath not in his own right, but in *auter droit*, that is, in the right of another, meaning his Teſtator. Secondly, that Executors are but the Miniſters and Diſpenſers, or Diſtributers, of their Teſtators Goods. Co. *Lib.* 6. 88. b. See this alſo *Plow.* Com. 5. 20. a.

Of alteration of Property in the Executor's hands, ſo as ſome Goods become his own, which he had as Executor.

TO this Head or Chapter, treating of the difference between the Intereſt in Goods as Executor, and others had meerly in one's own right and to his own uſe, it is not impertinent to conſider how that which one hath at the firſt as Executor may be changed in Property, and become the Executor's own to his own uſe, as other his Goods which he had not as Executor. Here let us firſt conſider of ready Mony left by the Teſtator: for ſince pieces of Mony, *viz.* Shillings, Groats, Pieces, and half pieces of Gold, cannot be known one from the other, it muſt needs follow, that theſe coming to an Executor from the Teſtator, muſt in ſome ſort

ſort be altered in Property, ſo as though the Executor ſhall be ſaid to have ſo much in mony or value, yet can it not be diſcerned which Mony in his Houſe was his Teſtator's, and which his own. Conſequently the Sheriff upon the *Fieri facias* for a Creditor, who hath recovered againſt the Executor a Debt owing by the Teſtator, cannot take away Mony in Execution as the Teſtator's, in my opinion. *Quære*, if thereupon a *Devaſtavit* ſhall be returned, or what ſhall be done.

2 *El.* Dy. 185 This divers Books affirm. 20 *H.* 7. 4. & Kel. *Rep.* 59. & 2, 3 *El.* Dy. 117. 6 *H.* 8. Dyer *fol.* 22.

But what if the Teſtator were indebted to the Executor, or if the Executor, not having ready Mony of the Teſtator's, or otherwiſe, ſhall pay a Debt of the Teſtator's with his own Mony, what ſhall we ſay of the Converſion or Alteration of ſome of the Goods from being his as Executor, to be his meerly in his own right? Hereof I have ſhewed elſe where my conceiving, which is briefly thus; That except either he have in his hands Mony of the Teſtator's, (for of that it is eaſie to make a proportionable change) or unleſs the Sum to him owing from his Teſtator, or by him paid for his Teſtator, amount to the full value of all the Teſtator's Goods in his hands, or do exceed

ceed the ſame, no Alteration can be, until ſome Election or Declaration by the Executor made which of the Goods not exceeding the Debt unto him, he will have to be his own: For where the Teſtator's Goods exceed this Debt to him, the Property of all cannot be changed; and of what part ſhall the Law adjudge the change, till choice by the Executor? It is good therefore for him to do as the Mother-Guardian in Soccage, who is to endow her ſelf, calling her Neighbours, and expreſſing to them which part of the Land ſhe will have for her Dower. So let the Executor do. But let him take heed that his Election or Declaration exceed not his Debt, leſt it be void. And that ſuch particular Election is to be made, ſeems to me proved by the Caſe of 21 *E. fol.* 21. where the payment of Mony, and detaining or taking of a Horſe of the Teſtator's, is mentioned. But *Choke* there ſays, this cannot be done without the Ordinaries Aſſent. And the Reporter thinks, though the Ordinary do aſſent, yet the Property ſhall not be turned into the Executor as his own.

Plow. 554 So of a Legacy in Mony given to the Executor.

See 2, 3 *El.* Dyer 187.

Another Alteration is of the profits of a Leafe come to the Executor from the Teftator: For fince no more thereof fhall ſtand in the Executor as *Aſſets* than ſo much only as exceeds the yearly value, according to the reſolution in *Hargrave's* Caſe, it muſt needs follow that the reſidue of the profits muſt be the Executor's, he paying the Rent out of his own Purſe; as that Caſe reſolves in conſequence, *viz.* that he ſhall be ſued for it in the *Debet*, and in the *Detinet* only as for the Rent due before the death of the Teſtator. Thus though he have the Leaſe as Executor, yet part of the profits are meerly his own, not as Executor.

Co. 1 f. 31 *b.*

And looking back upon this Caſe, we may diſcern a neceſſity ſometimes of the Executor's paying with his own Mony for his Teſtator's Debt: as where the Teſtator being to pay a Rent at *Michaelmas* or our *Lady-day*, he dies a day or two before, or, to put it more clearly, a day or two after the Feaſt, not leaving any Goods to pay the Rent, other than the future profits of the Leaſe. Here, unleſs that the Executor will forfeit the Leaſe, he muſt lay out of his own Mony.

Now

Now if in this and other like Caſes he could not do this until he had under Seal, or by act in the Court Spiritual, an Aſſent of the Ordinary, it would be an extraordinary trouble to Executors.

I find alſo *tempore Hen.* 7. another mean of altering Property, to wit, where a *Fieri facias* comes to the Sheriff to ſell or levy a Debt of the Teſtator's Goods; now, ſaith the Book, may the Executor buy theſe Goods of the Sheriff as well as another; and if he do, the Property which he had as Executor ſhall be turned into a Property *in jure proprio.* 20 H. 7. 5. a.

If an Executor amongſt his Teſtator's Goods find and take ſome not his, and after, theſe being claimed by the Owner, who left them in the cuſtody of the Teſtator, the Executor not crediting the claim, ſtill keeps them, and the Owner thereupon recovers Damages in an Action of Treſpaſs, or of Trover and Converſion; now (and ſo in all other like Caſes) are theſe Goods become the Treſpaſſor's in property, becauſe he hath paid for them; therefore it is not ſtrange, if in like manner an Executor, paying out of his own Purſe for or in lieu of the Teſtator's 20 H. 7. Kelw. Ca. 59

Goods, have ſo much of them (where no certainty) changed in property, and become his own. This is but put as an inſtance underſtood with the exceptions and cautions precedent.

CHAP. VIII.

Of ſome Caſes and Queſtions between the Executor and the Heir.

21 H. 6. 30. If other goods taken among them, he is excuſed. 21 H. 7. 25. *Vid. lib. Intr.* 640. It is ſo pleaded.

THE Executor may in convenient time after the Teſtator's death enter into the Houſe deſcended to the Heir, for the removing and taking away of the Goods, ſo as the Door be open or at leaſt the Key be in the Door: and this I underſtand of the Door of each Room. For although the Door of entrance into Hall and Parlour be open, the Executor cannot by that juſtifie the breaking open of the Door of any Chamber to take Goods there, but only may take thoſe in the Rooms which be open. And this is proved, as to me it ſeems, by the Caſe of the Cheſt with Evidences, which, ſaith the Book, the Executor may

may take and put out the Deeds, delivering them to the Heir, *viz.* the Cheſt being unlocked, as I underſtand it. Now a Chamber or other Room within a Houſe locked is an incloſure of better reſpect than a Cheſt. But if the Goods be not removed within convenient time, the Heir may diſtrain them as *damage feaſant*.

43 E. 3. 24. Bro. 145. makes a *Quæ.* if it be locked.

Plow. *Com.* 280.

Where the Teſtator recovers Land and Damages, or a Deed and Damages, he dying before Execution, the Heir ſhall have Execution for the Land or Deed, and the Executor for the Damages: but *temp. Edward* 4. it is ſaid, that until the Heir ſue a *Scire facias*, the Executor cannot ſue Execution for the Damages.

43 *Ed.* 3. 2. 10 *Ed.* 4. 5, 6. Of the Deed, Execution firſt.

If a Creditor be made Executor by his Debtor, and pay himſelf part out of the Goods, he cannot ſue the Heir for the reſt, becauſe the Debt cannot be apportioned; but otherwiſe he may, ſaith the Book: yet *Quære*, if he do take upon him the Executorſhip, and have Goods ſufficient to pay all.

12 H. 4.

If a Debt be recovered againſt one who dieth before Execution ſued, leaving Goods ſufficient to ſatisfie; now ſhall not the Land deſcended to the Heir be charged

7 *H.* 4. *f.* 31. See Bro. *Ex.* 124.

therewith, nor by like reason any Land conveyed after Judgment.

Co l.3.f.90, 91. To like purpose see more, *Litt.* f.77.b. 2 El. Dyer 281. Plow. *Com.* 291. 21 H.7.4.

See a good difference, where Land is conveyed upon condition of payment to the Vendor, his Heirs or Assigns, and he dieth before the time, and where it is to be paid to the Vendee, his Heirs or Assigns, and he dieth: in the first Case payment shall be to the Executors, but not in the other.

What things pertain to the Heir, and what to the Executor, is before shewed. As for *Frowick*'s opinion, that where Goods be mortgaged upon condition, that if the Heir or Executor pay, *&c.* here if the Heir make payment, he should have the Goods, I see not, for my part, how that can be.

A *Directory* for the following Chapter.

A. *All (as but one) represent the Testator's person, and must joyn and be joyned in Suit*; & e contra.

B. *Where one alone must answer Suit, and how.*

C. *When they differ in Plea, the best shall be*

be taken, but one may confeſs alone.

D. *One, as well as all, may give Aſſent, or releaſe the whole.*

E. *One cannot give, nor releaſe to another, nor divide.*

F. *The poſſeſſion of one is the poſſeſſion of all, to what purpoſe.*

G. *If the Survivor die Inteſtate, the Teſtator is Inteſtate, though the other Executor left an Executor.*

H. *Executor included in the perſon of the Teſtator, and repreſents it, is his Aſſign; all one:* & e contra.

I. *What change by death of the Teſtator, touching proceeding in Suit.*

K. *Proceed to or in Execution; where without* Scire Facias.

M. *Whether the Executor ſtand in his own quàlity, or his Teſtator's.*

N. *Where one alone may ſue.*

O. *In Suit for them, ſuch as will not joyn ſhall be ſevered, and the other may ſue and proſecute alone: Conſequents* inde.

P. *Death of one Executor, Plaintiff or Defendant, where abates Writ.*

CHAP. IX.

How Executors ſtand between themſelves, and in repreſentation of, or relation to the Teſtator, as his Aſſignee or Deputy, or as the ſame perſon with him; and where, and to what purpoſe, as other perſons.

Are as one perſon; therefore cannot plead ſeveral Pleas in Abatement. 37 *H.*6.17. 39 *H.*6.44. 38 *E* 3.9. Bro. *Ex.*13. Br.Ex.20,21

FIrſt, all of them do repreſent the perſon of the Teſtator, and therefore muſt they all joyn in Suit againſt others, and in Suit by others they muſt be all made Defendants, or at leaſt ſo many of them as do adminiſter: for though the Executors themſelves muſt take notice by the Will how many Executors there be, and muſt frame their Suit accordingly; Creditors and Strangers need not take notice of any more than to adminiſter, and execute the Office of Executors. For this reaſon, as I take it, In the time of King *Edward* the third, where two Executors were of a Term, and the Reverſion was granted by Fine, mentioning but one Termer, and thereupon a *Quid juris clamat*

Therefore one Executor ſued, if he pleads that there is another Executor not ſued, muſt plead that he did Adminiſter. 9 *H.*6.44. Bro.13. 33 *H.*6. 38. Bro. 20. 32 *E.* 3. *Quid juris clamat* 5.

clamat accordingly brought againſt that one Executor; this was held good enough, though the other Executor was not named in the Suit: belike, becauſe that one (who indeed was the Teſtator's Wife) did only occupy the Land, and take the profits thereof; for elſe, ſince all the Executors do repreſent the Teſtator's perſon, all muſt have been named. Therefore did the Judges reſolve in the time of *Hen.* 4. that where a Leſſee for years made two Executors, and one of them was diſtrained by the Lord for Rent, who avowed upon the Leſſor; that Executor ſhould have Aid of his Fellow-Executor, to the end that both might have Aid of the Leſſor, which one alone could not. And upon this reaſon, *viz.* that the Executors repreſent the perſon of their Teſtator as one perſon, (for ſo ſpeaks the Parliament) it was enacted in the time of *Edward* the third, that the Executors, though never ſo many, ſhall have but one Eſſoyn, either before appearance or after, becauſe their Teſtator, whoſe perſon they repreſent, could have had no more.

13 H. 4. Aid 186.

A.

9 Ed. 3. c. 3. A.

It is farther alſo enacted by the ſaid Statute, that where two or three Executors or more be, they being ſued in an Action

Action of Debt, though all do not appear, yet ſuch one of them or more as doth or do appear at the Grand Diſtreſs, ſhall anſwer alone without his or their Companions. And this Statute hath been taken by Equity in three reſpects.

B. But not if he appear at the ſummons, 1 *E* 4. 1. 14 *H* 4. *f.* 11. But the Plaintiff muſt declare againſt all. He need not but he may admit another to appear and plead after. 7 *H.* 4. 12. But Proceſs muſt be continued againſt all. 7 *H.* 6. 35. Executors of Executors by Equity. 30 *H.* 6. 45. Bro. *Ex.* 99. 28 *H.* 6. *f.* 4. 14 *H.* 4. 23, 24. So negatively. 22 *H.* 6. *f.* 1. 28 *H.* 6. *f.* 4. 3 *H.* 6. 35. *a.* 39 *E.* 3. 5. There it is not meerly as Executors; it is out of the Stat. 11 *H.* 4. 63 as if in *Deb. & det.*

Firſt, touching the Perſons; that it ſhall extend not to Executors only, but alſo to Executors of Executors, yea to Adminiſtrators alſo; though the Stat. ſpeak only of Executors.

Secondly, touching the Action; whereas the Statute ſpeaks only of the Action of Debt, it is taken by Equity to extend to other Actions, as the Writ *De rationabili parte bonorum*, and *Detinue*: yet perhaps the later Action will be ſaid not to be maintainable againſt Executors for their Teſtator's act, but for their own only. But we are not yet come ſo far as to determine what is maintainable, but whether, before all the Executors do appear, he or they which have appeared ſhall be put to anſwer; and ſo to bring it to Deciſion, whether the Action be maintainable or not. I think alſo that in the Action of Covenant, and all other Actions againſt Executors as Executors, he which appeareth muſt

must anſwer without his Companions; though the greater opinion in the *Quadrageſimes* were contrary touching the Action of Covenant. But as for the *Subpœna* againſt the Executors, which is to make them to anſwer to a Suit in Equity, that hath been *temp. E.* 4. taken to be out of the reach and intent of the Statute. So alſo of the *Latitat* in the *King's Bench*, as was held in the ſame King's time; except all the Executors, making up the whole repreſentative body of the Teſtator, be in the cuſtody of the Marſhal, one or more of them who are there ſhall not be inforced to anſwer: and ſo was it alſo lately held in the *King's Bench*, where Maſter Juſtice *Houghton* gave an excellent reaſon that this Caſe is out of the ſaid Statute, *viz.* for that this Writ doth not mention any Debt, or name the Defendant's Executors.

B. *Cont.* 47 E. 3. 22. So 7 E. 4. 20, 21. 3 H. 4. 20. In *Sci. fac.* upon a Pardon by a Defendant outlawed at their Suit. 47 E. 3. 22. Only *Fenold* in the affirmative. 8 E. 4. 5. 9 E. 4. 12, 13.

B. 20 *vel* 21 *Jac. Regis.*

Thirdly and laſtly, That Statute is extended by Equity to other Writs or Proceſs: for where the Statute ſpeaks only of the grand Diſtreſs, and the Executors appearing thereupon; it hath been many times ruled, that when he or they appear upon the Attachment, *Capias* or *Exigent*, anſwer muſt be, though the

B. 1 E. 4. 1. 40 E. 3. 1.

the reſt appear not; for ſo the word *Diſtreſs* is taken for all compulſory means, or enforcement of Appearance. But where the Statute reacheth not, *viz.* when the Proceſs is determined againſt one or more as by Outlawry, *&c.* there the reſt muſt anſwer by the Rules of the Common Law; except it be in the caſe of Husband and Wife Executors, for there the Wife cannot anſwer without her Husband, nor doubtleſs can he without her, where ſhe and not he is Executor; but where both be Executors, there he may anſwer without her, but not ſhe without him. When Executors as Defendants have appeared, if any one of them will confeſs the Action, this binds and concludes the reſt; but if one will plead one Plea, and the other another, that (ſay ſome) ſhall be received which is beſt for the Teſtator's State: ſo where they ſue, ſuch as will not proſecute ſhall be ſevered, and the reſt without them may proceed; and in like manner where they pray to be received to defend their Term, and one of them after makes

B. 11 *H.* 4. 63.

C. Or if but one appear, 28 *H.* 6. *f.* 364 Judgment againſt all. See 9 *E.* 4. 12, 13, 14. Where *B*, who is not, Executor, is jointly ſued with *A*, and *B* confeſſeth 21 *H.* 7. 25. Yet 7 *E.* 4. 7. they may ſever in Pleas not dilatory

C. 7 *H.* 6. *f.* 6. *per Cottesmore.* If they recover, and one of them prays a *Cap. ad ſat.* and the other a *Fieri fac.* the firſt, as beſt, ſhall be granted, 3 *H.* 4. 10. Bro. 44. So where the Defendant Outlawed at the Suit of two Executors, and upon the *Scire facias* after his Pardon but one appears, 21 *H.* 7. 25. 9 *E.* 4. 12, 14.

Default,

Default, it ſhall not be the Default of all; but the reſt, or he, if it be but one who appears, ſhall be received to uphold the defence of the Term.

Thirdly, ſo where they plead a Releaſe to the Teſtator or themſelves, one after making Default; this ſhall not be nor make a total Default in the Executors, to induce a Judgment or Condemnation againſt them. Yet in truth, each Executor hath the whole of the Teſtator's Goods and Chattels, be they real or perſonal, and each may ſell or give the whole. One of them cannot give nor releaſe to the other his Intereſt; and if he do, it is void, and he who releaſeth ſhall ſtill have as much Intereſt as he to whom he releaſed, becauſe each had the whole before. Upon this reaſon long ſince, where one of the two Executors releaſed but his part of a Debt, it was held that the whole was diſcharged. And ſo, if one Executor grant his part of the Teſtator's Goods, all paſſeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moieties between Executors. Therefore alſo, though a Leaſe for a thouſand years of a thouſand Acres of Land come to two Exe-

21 E.3.13. 27 H.8.21, 22. D. E.

C. If an Horſe come to four Executors, each hath an Horſe, and yet all four have but one.

E. Executors or more, no partition or divi-
ſion can be made between them, be-
cauſe it is not between them as between
joynt Leſſees of Land where each hath
but a moiety in Intereſt, though Poſſeſ-
ſion of or through the whole. Amidſt
D. Executors each hath the whole, and there-
fore if he grant his part, he grants the
whole. But one Executor may demiſe or
grant the moiety of the Land for the
whole Term, and ſo may the other do;
and this way they may ſettle in Friends or
others truſted for them, a moiety for
each, either in ſeveral or undivided;
but one of them cannot make a Leaſe to
the other of any part, for he had the
whole, nor can one ſue the other as Exe-
cutor. Yet if the Teſtator deviſe to one of
his Executors all his Goods, after ſuch
Debts and Legacies ſatisfied, there, after
6 H.7. 5. thoſe ſatisfied, the Executor may take
the Goods, and maintain an Action of
Treſpaſs againſt the other Executor,
if he take them from him, and con-
ſequently an Action of *Detinue*, for
keeping or detaining them: but this is as
Legatee, his own aſſent perfecting the
Legacy.

The poſſeſſion of one Executor is the
poſ-

poſſeſſion of all the reſt: ſo as if one appearing to a Suit, and the other making Default in whoſe hands all the Goods be which are not adminiſtred, if, I ſay, here he that appears pleads that he hath nothing in his hands, this ſhall be found againſt him; for whatſoever any of the Co-Executors hath, he alſo hath, and is in his poſſeſſion; and ſo ſhall the Creditor recover, and have Judgment to be ſatisfied out of the Teſtator's Goods, as in his hands. And therefore if Goods be taken from one, all may maintain an Action of Treſpaſs thereupon; for the poſſeſſion of one is the poſſeſſion of all. But the poſſeſſion of one ſhall not be ſo the poſſeſſion of all, as to charge the other's own Goods, whereof more elſewhere.

14 *H.*4.12. Bro. 12. F. All muſt ſue 19 *H.*6.65. *Cont.* 24 *E.* 3.26. It may be in his name only from whom taken nor need he be named Executor. *Bra. Exe.*31. 39 *H.*6.45. F. G. 38 *H.*8.Bro. *Exec.* 149. 39 *H.*6.45.

Where two Executors be made, the one making a Will and Executors, and dying, if the other die after Inteſtate; now ſhall not the Executor of him who firſt died be Executor to the firſt Teſtator, but he is dead Inteſtate, becauſe the ſurviving Executor is ſo dead, and in him the Executorſhip was wholly and ſolely ſetled by the death of his fellow before him. So Adminiſtration *de bonis non admin.* ſhall be committed.

The

The Executors, or Executor, if but one ſo repreſents the perſon of the Teſtator, that he is in Law his Aſſignee by the very making of him Executor: ſo as if one Covenant to make a Leaſe to *J S* and his Aſſigns by ſuch a time, and *J S* dieth before that time, and before the Leaſe made; now muſt the Leaſe be made to his Executors as his Aſſignees, repreſenting his perſon: ſo alſo in a condition to pay the Feoffor or his Aſſignee: yet a Leaſe to *A* and his Aſſigns during the life of *B* ſhall not go to the Executors of *A*. So where in a general Pardon by Parliament there is an exception of perſons Outlawed after Judgment, the perſon ſo Outlawed ſhall ſatisfie the Creditor who hath outlawed him. If the Outlaw die before this done, his Executor, as repreſenting his perſon, may make ſatisfaction, and ſo make the benefit of the Pardon to extend to his Teſtator, for ſaving his Goods, as if himſelf had ſatisfied his Creditor, though he left him unſatisfied when he left the World, *& diem obiit extremum.* Yet where *A* ſold Land to *B* upon *Proviſo*, that if he payed to *B*, his Heirs or Aſſigns, *&c.* *B* died, *A* payed at the day to his Executor,

Co. lib. 5 f. 97. H. *Chapman, & Dalton's Caſe. Plow.*

Sir *Edward Phiton's* Caſe. *Co. lib. 2. f. 80.*

A. So where the Stat. of *W.* 1. gives time for proof to him whoſe goods were wrefted, his Executors may do it, if he die before the time. *Co. l. 5. 107. b. Co. lib. 6. f. 80.*

tor, and it was doubted that it was not good; for the word Aſſignee could not reach to him, being no Aſſignee of the Land. And where the Executor brought an Action of Account upon a Receipt by the hands of the Teſtator, the Defendent could not be admitted to wage his Law; for that this was held a Receipt *per auter mains*: yet it is clear, that if one by Bond or Covenant tie himſelf to pay ſuch a Sum at ſuch a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or perſon of the Teſtator. And where the Statute of 23 *Hen.* 8. gives the Writ of Attaint (in the courſe there mentioned) againſt the party that had Judgment, it lieth againſt the Executors, if he be dead; but therefore another reaſon is given. Where a Man was bound that he would not ſue upon ſuch a Bond, and he died, and his Executor ſued; this was held to be no Forfeiture of the Bond. So where one was bound to pay ten pound within a month after requeſt made to him, and he died before requeſt; it ſufficed not to make it to the Executor, as *Manwood* ſaid. It was likewiſe held, that the Warrant of Attorny put in for the

Alſo Executors may have reſtitution for ſtoln goods, and a Writ of Error; yet the Statute ſpeaks but of the party. A. 2 *El. Dy.* 180. *Cont.* where to *A* the Feoffor, his Heir or Aſſign. Co. *lib.* 5. *f.* 97. 2 *El.* Dy. 183. 201.

H. 25 H. 8. 16.

M. 15 & 16 *Eliz.*

L. 34 *Eliz. vel circiter*, Titherly and Lexeor. Walsh. *in Ban. Reg.* I. 36 *H.* 8. Bro. *Stat. Merchant* 43. K. 2 *R.* 3. 8. H. I. 15 *H.* 7. 14. F. 15 *E.* 3. *Respond.* 1. *con.* upon a Stat. Merchant.

Plaintiff in Debt, it sufficeth not for his Executor to bring a *Scire facias* upon the Judgment. And if Executors sue Execution upon a Statute in the name of a Conusee, as if he were alive, this is void, and they may sue out new Extent; and this they may do without any *Scire facias*, as well as the Conusee might if he had been alive. But by *Hussey*, Justice, If the Conusor in a Statute-staple be returned dead by the Sheriff upon the Extent, a *Scire facias* must be sued out before Extent proceed; and upon a Judgment had, if the Recoverer die before Execution, his Executor cannot, as himself might, sue out Execution without a *Scire facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any Action of false Imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth.* it was resolved upon the motion of *Anderson*; but withal it was held, that relief might be by *Audita Querela.*

K. *Cont. Nat. Br.* 267. upon a Recog. I. H. 30 *El. Rot.* 31 *in Ban. Reg.*

Like Resolution was in the *King's Bench*, after some doubt by *Wray* and the other Judges, where the Defendant died

after a *Fieri facias* awarded, and before it was executed; that the Sheriff might proceed upon the Goods in the hands of the Executors.

But if the Defendant in an Action of Debt upon a Bond plead a Tender at the time and place of payment, and tenders the Mony in Court, where it rests, and then he dies; now shall not the Plaintiff have this Mony, because the property thereof is changed, and become the Executors, as was held in the *Common Pleas*; but he is to put a new Suit against the Executor.

Yet where Judgment is once given in a Writ of Partition for a Termer, or in a Writ of Account; if the Plaintiff die before the second Judgment needful in both cases, the Executor is not put to a new Suit, but may proceed by *Scire facias* upon the former Judgment: as the L. *Anderson* held, upon the motion of *Fenner*, Serjeant. Though before we found the Executor not in points penal all one with the Testator; yet in points beneficial, the Testator includes him in some Cases: As where an Abbot granted to his Lessee to take Estovers in another's ground, it was held that his Executor, though

32 *El. vel circiter.* I. *Pasch.* 28. H.

not named, ſhould enjoy this during the term, as well as himſelf ſhould have done. And whereas the Statute of 23 *Henry* the 8. gives Coſts to a Defendant againſt a Plaintiff ſuing for a wrong, or breach of promiſe, or the like, done to the Plaintiff, againſt whom it paſſeth by Verdict or Non-ſuit; it hath been reſolved, that an Executor ſuing upon ſuch wrong, or breach of Contract to his Teſtator made, ſhould not pay Coſts, becauſe he is another perſon than the Teſtator; and ſo it is uſual in experience. But if in Suit the Attorny of the Executor misbehave himſelf towards him, and for this the Executor ſueth him; here, if it paſs againſt him in manner as aforeſaid, he ſhall pay Coſts, becauſe this was a Suit for a wrong done to himſelf.

Trin. 36 *El. in Ba. Reg.* H. M.

Pal 41 *Eliz. in Com. Ban.*

If *A* recovers a Debt as Executor of *J S*, and makes *B* his Executor, and dies before Execution ſued; *B* is not put to new Suit, but may have Execution upon that Judgment. But if *A* or *B* died Inteſtate, now could none as Adminiſtrator to either of them, nor as Adminiſtrator of *J S*, have Execution of this Judgment; for the former hath no intereſt in

M. 28 H. 8.

in any thing pertaining to *J S*, and the later cometh to Title above the Judgment, *viz.* as immediate Adminiſtrator to *J S*, who is now dead Inteſtate, and derives no Title from the Executor who recovered.

If a Conuſee have a Certificate into the *Chancery* upon a Statute, and then dies before Extent taken out; his Executor is put to a new Certificate, and for obtaining of it muſt make *Affidavit* that no Extent hath yet been taken out. 2 El. Dy. 180. L.

If an Alien joyn with his Wife who is Executor in a Suit for Debt, and it cometh to Iſſue, he ſhall not have Trial *per medietatem alienig.* or *Linguæ*, as ſhould be if he otherwiſe were party to a Trial; as was held in the Caſe of Doctor *Julio*. Yet if a Nobleman ſue as Executor to another not noble, he ſhall for his Non-ſuit be amerced five pound, as if he ſued in his own right; as was conceived 21 *E.* 4. 77. By the ſame rule and reaſon, doubtleſs, a Nobleman ſued as Executor ſhall not be arreſted, nor ſhall any *Capias* be awarded againſt him for not appearing. And if any Trial ſhall be of any Iſſue, there ſhall be two Knights M.

of the Jury, as in other Cases where a Peer is party. Likewise where the Wife is to have her convenient Apparel, whereof the Executor must not bereave her; if she be a Noble-woman, it shall be answerable to her degree.

A. 38 E. 3. f. 9. N. If one Executor only sell Goods of the Testator, he alone may maintain an Action of Debt for the Mony. So if Goods be taken out of the possession of one Executor, he alone may maintain an Action, and that without naming himself Executor.

Some such hath been before of Summons and Severance, whereunto be this added: If one Executor will not or cannot conjoyn in Suit with the other, so as he is summoned and severed; now by his death after the Suit is not abated, *16 Eliz. 2. Fitz.* 111. Yet if he live till Judgment, he may sue Execution, say other Books, 13 *Ed.* 3. *Fitz. Exec.* 9. 11 *R.* 2. *Priviledge* 2. Yet *Quær.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, *Mich.* 14 and 15 *Eliz. Dy.* 319. And the reason thereof being, because he is no party to the Judgment; by the same reason can he not sue Execution upon it; for how can he

M. O. 3 H. 7. I. & 5 E. 2. Fitz. *pro* 802. *Cont.* 38 E. 3. 13. & 20 E. 3. *tit.* Account 78.

he have Execution, for whom there is no Judgment given? Now the Recovery is only in the name of the other Executor. Yea, by the ſaid laſt Book it ſeems that after Judgment had he cannot releaſe the Debt, becauſe it is now altered in nature, and turned *in rem judicatam*; though at any time before Judgment he might have releaſed it, as both that laſt Book ſaith, and the two precedent, *temp. Ed.* 3. *Rich.* 2. Yea, in an Action of Account, after Judgment had that the Defendant ſhall account, the Releaſe of him ſevered is a good Diſcharge to the Defendant; as was reſolved 48 *Ed.* 3. 14, 15. But this is not a plenary Judgment, for nothing is recovered thereby; but another Judgment is to be had after the Account, which may be againſt the Plaintiff, ſo as this Releaſe came before any Debt or Duty adjudged. What if the Defendant be had in Execution at the Suit of the Executor, who proſecutes it and eſcapeth? Whether may the ſevered Executor diſcharge the Sheriff or Goaler by a Releaſe? I think he may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

Writ is abated; only where he ſo dying was before ſevered, Opinions have been different, as above appears. So alſo is it if one of the Defendants Executors die. Yea, if the Plaintiff Creditor ſue *A*, *B* and *C*, as Executors, where only *A* and *B* are Executors, there by the death of *C* the Writ abates, or falls to the ground: yet *A* and *B* (as I think) might have pleaded in Abatement, that they only were Executors, traverſing that *C* was not Executor: but the Book doth not ſo reſolve. See 46 *Eliz.* 3. *fol.* 9, 10.

2 H.4. f. 14.

P. 9 E. 4. 12. Bro. 34.

As *A* and *B* above might admit that Writ againſt them and *C*; ſo if the Writ or Suit had been againſt *A* only, and he ſo admit it, not pleading in Abatement, the Recovery againſt him alone is good, 9 *E.* 4. 12.

A.

21 H.6. 30. M. 21 E. 4. 49. 69. 42 E. 4. 13. 14 H.6. 14, 15.

One that is Outlawed, or Attainted in his own perſon, may yet ſue as Executor, becauſe this Suit is in another's right, *viz.* the Teſtator's: But he that is Excommunicate cannot proceed in Suit as Executor, becauſe none can converſe with him without being excommunicate, as a Book ſays, Yet doth not this Excommunication pleaded abate or overthrow the Suit,

Suit, but make that the Defendant may ſtay from anſwering his Suit until the Plaintiff be abſolved and diſcharged from his Excommunication.

3 H. 6. 40. Littl. 44. Co. l. 81. 69. 11 R. 2. *Excom.* 25.

CHAP. X.

Of the Poſſeſſion of Executors, or their actual Having.

1. *What ſhall be ſaid ſo to come to their hands as to charge them.*
2. *What ſhall be ſuch a getting or going from them as to excuſe them.*

WE have before conſidered what things ſhall come to Executors, and, being come, ſhall be *Aſſets* in their hands. Now, for that it is ſaid in *Reede*'s Caſe, that an Executor ſhall not be charged with or in reſpect of any other Goods than thoſe which come to his hands after his taking upon him the charge of the Executorſhip; let us now examine what ſhall be ſaid and accounted ſuch a full and compleat coming to the hands of Executors, as ſhall make them within the reach

Co. *lib.* 5.

reach and charge of Creditors and Legatees, *viz.* for the payment of Debts and Legacies. As touching Debts due to the Teſtator, it hath before been ſhewed, that until Judgment and Execution had they be not *Aſſets* in the Executor's hands. Now then as touching other Goods or Chattels poſſeſſory, which are of two kinds, *viz.* real and perſonal, let us put the caſe thus.

The Teſtator at the time of his death hath a ſtock of Sheep in *Cumberland*, Corn in the Barn in *Cornwall*, Bullocks in *Wales*, fat Oxen in *Buck. ſhire*, Mony, Houſhold-ſtuff and Plate in *London*, a Leaſe for years in *Norfolk*, and his Executor dwells at *Coventry*, *viz.* far from all theſe places; what kind of Poſſeſſion ſhall the Law judge this Executor to have in every of theſe inſtantly upon the Teſtator's death, and before he come where any of the things be, either to ſee or ſeiſe upon them? In all the particulars above mentioned the Law is all one, except the Caſe of the Leaſe for years; which if it be of Land, (as is moſt uſual) then, becauſe it is a ſetled and immoveable thing, the Law doth not reach to it the foot of the Executor, to

Perk. 6. b.

put

put him in actual poſſeſſion, (for *Poſſeſſio eſt quaſi pedis poſitio*) until himſelf or ſome for him do actually enter thereupon. Nor indeed need the Law help or ſupply the want of actual poſſeſſion in this Caſe, as in the caſe of Moveables; ſince Land cannot be carried away as Goods may, and therefore is not ſubject to purloyning or imbeſilment as Moveables are. But if the Leaſe for years were of Tithes, the Executor, though in never ſo remote a place from them, ſhall be inſtantly upon the ſetting out thereof in actual poſſeſſion of them, ſo as he may maintain an Action of Treſpaſs againſt any Stranger which ſhall take the Tithes ſet out, though he nor any for him did ever before poſſeſs any of the ſaid Tithes, or came near unto them. But if the Caſe were of a Leaſe for years of a Rectory, conſiſting not only of Tithes, but alſo of Glebe-Lands, into which Entry may be made, as alſo Livery of Seiſin in it; then it may perhaps be ſome queſtion, whether ſuch an actual poſſeſſion in Tithes ſhall be given by the Law to an Executor neglecting to enter, or not entring into the Glebe-Land. And ſo I leave the conſideration of Chattels real.

45 E. 3. 17.
21 H. 6. 43.

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Co. *lib.* 5. 9 E. 4. 50. Plow. *Com.* 281. 32 H. 6. 13. 14 H. 8. 22.

Touching things Perſonal, in which the Executor hath ſuch an actual poſſeſſion preſently upon the Teſtator's death, as that he may maintain an Action of Treſpaſs againſt any Stranger taking them away, or ſpoiling them, though he nor any for him ever came near them; whether yet this ſhall be ſuch a Poſſeſſion in the Executors, and ſuch a coming of theſe Goods to their hands, as to charge them with payment of Debts and Legacies, yea to make their own Goods liable inſtead of theſe, is a Point worthy of conſideration.

And, doubtleſs, this throughly ſifted will prove a Caſe miſchievous, whether-way ſoever the Law be taken. For firſt, it muſt be admitted, that without the Executor's laying his hands actually and particularly upon the Goods in the Houſe or Fields of the Teſtator, whether the Executor hath reſorted, he ſhall be ſaid ſo in poſſeſſion as to ſtand liable unto the Creditors, ſo far as they extend in value, though after others purloyn or imbeſil them. Now then, if diſtance of place ſhall make difference, where ſhall be the bound and limit of that diſtance? And if the Executor may come after

after a ſtranger's taking or poſſeſſing of the Goods, it is miſchievous to Creditors.

On the other ſide, if it ſhall be laid upon the Executors to anſwer for all the Goods whereof the Teſtator died poſſeſſed, it will be miſchievous for them, and deter them from taking Executorſhip upon them; ſince much purloyning may be even of Mony, Jewels and Goods, by Servants and others about the Teſtator, or where theſe things be. I think therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Teſtator's Goods, ſo as that they may diſpoſe of them, eſpecially if it cannot be known by whom they are ſo purloyned and imbeſilled, or if they be perſons fled or inſolvent; that then they ſhall not ſtand upon their ſcore, as Goods come to their hands, in reſpect whereof Creditors or Legatees ſhall draw ſo much from them even out of their own Goods, as in other Caſes where they have no ſuch excuſe.

And of this mind I the rather am, becauſe I find the whole Realm in Parliament

13 H.6.c.1. liament taking notice of ſuch prevention of Executors coming to the Goods of their Teſtator, by the wrongful act and imbeſilment of others, without any default in themſelves. And in this Caſe the Parliament hath given ſpecial remedy, *viz.* that Writs ſhall be directed to Sheriffs, to make open Proclamation for the appearance of the parties delinquent in the *King's Bench* at the day limited; and in default thereof they ſhall be attainted there of Felony, the Writ being returned, executed, *viz.* Proclamation made. But note, that this Proclamation is to be made two Market days, within twelve days next after the delivery of the Writ, and the laſt Proclamation muſt be fifteen days before the day of Appearance. And theſe Proclamations muſt be made in ſuch Cities, Boroughs, or Places, (ſaith the Statute) not expreſſing what is meant by the word *ſuch*, and therefore meaning doubtleſs thoſe in which the act of offence is committed. So that if the fact be not committed within the limits of ſome City, Borough, or Market-Town, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market-days in the place where,

&c.

&c. Now beſides, other Places, even ſome Boroughs, *viz.* Towns ſending Burgeſſes to the Parliament, have no Markets, and ſo are no places within the Act. Alſo two Executors muſt require this Writ; therefore where there is but one Executor, no relief is given by this Law, for it is penal, making Felony, and therefore ſhall not be extended by equity beyond the words. Laſtly, it extends but to the Executors of Lords and perſons of good Degree, and only to the treſpaſſing Servants of ſuch perſons, not to other Strangers, purloyning the Goods. But now who ſhall be ſaid to be perſons of good Degree, not being Lords, I will not much labour to decide; the rather, becauſe I have not heard nor read, to my remembrance, of any Action brought upon this Statute: but I think that good Degree muſt ſtay either at a Knight, being the loweſt Dignity, or at a Gentleman, being a degree a Worſhip, as elſewhere is ſhewed, and not ſtoop any lower.

And the ſaid Statute ſeems in ſome ſort to imply an opinion this way which I incline to, in that it expreſſeth his purloyning to be an impediment of the Execution

cution of the Will, whereas if the Executors ſhall anſwer and make good to Creditors and Legatees out of their own ſtate and goods, for theſe imbeſilled, the Execution of the Will is not hindered, but the Executors are dammified in their own private value. Yet it may be ſaid, on the other ſide, that ſome things given *in ſpecie* by the Will, ſuch a piece of Plate, ſuch a furniture of a Bed or Chamber, ſuch a Jewel, may be purloyned, ſo that the Legatees can never have them, and conſequently, the Execution of the Will be hindered, though ſome recompence be made by the Executors: but how theſe Legatees ſhall recover recompence in ſuch Caſes, for that Legacies are not to be recovered by Suit at the Common Law, I muſt leave to the Profeſſors of the Common or Civil Law to inform. But if the Executor be of ſecret aſſent to this imbeſilment, whereof even the forbearance to ſue for the recovery of the things, or the value of them in damages, if known where they or the imbeſillers be, is is a ſhrewd evidence, or proof; then ſhall the Executor be adjudged an haver of them, and ſo ſtand charged as having them: for *Pro poſſeſſore habetur qui dolo*

dolo desiit possidere. And if in any Case the taker by prevention from the Executor, before his knowledge (perhaps) of the Testator's death, or, at least, before his possibility of repair to the place where the Goods were, to put them in sure custody, if, I say, such Actor keep these Goods from falling upon the shoulders of the Executor, they shall surely fall upon himself, and make him chargeable at the Creditor's Suit, as an Executor of his own wrong.

Of Goods lost by or gotten from Executors.

But put we the case (for thereunto shall be our next step) that Goods come fully into Executors possession and hand, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own Estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our Learning touching Escapes of persons taken in Execution and imprisoned, if such be rescued by Alien enemies, the Sheriff or Goaler shall not answer out of his own Goods for this Debt; otherwise, 33 *H.*6.1. 10 *E.* 4. 2, 3. 7 *Eliz.* Dy. 241.

if it be done by Subjects, againſt whom remedy is to be had by the courſe of Juſtice: and ſo ſhould I think it to be touching Executors, *viz.* That if Enemies landing (as near the Sea-Coaſt may eaſily and often happen) ſhall take away Cattel or Goods from an Executor, hereby he ſhall be excuſed; contrariwiſe ordinarily, if the ereption or direption be by Subjects known, and thereby actionable. Another difference I ſhall think may probably be taken from the Rules of our Learning touching Bailment. If *A* deliver Goods to *B* to keep as his own, or generally, *viz.* without any ſpecial undertaking by *B*, to keep them ſafely, and without any Mony or other valuable conſideration given for the ſafe cuſtody: here, if *B* be robbed of them, he ſhall not make ſatisfaction to *A* for them: and ſo if they be ſtoll'n from a Servant or Factor. But if they be taken away by a known Treſpaſſer, not felonioufly, ſome opinion hath been that the Keeper ſhall make recompence, becauſe he hath remedy for recompence, or ſatisfaction from the Treſpaſſer. Yet of this later I ſhould doubt, becauſe *A* himſelf as well as *B* may have this Action

Vide 29 *Aſſ.* p. 28. 8 *E.* 2. *Fitz. Detin.* 59. 9 *E.* 4. 90. 13 *H.* 7. 4. *Co. lib.* 4. *fol.* 83, 84.

on

on for damages againſt the Treſpaſſer. Now an Executor is of the nature of ſuch an one, having the cuſtody of another Man's Goods; and I have ſeen in a Manuſcript entire, the Writ of Treſpaſs by the Executor, expreſſing Goods of the Teſtator in the cuſtody of the Executor to be taken from him: therefore methinks he ſhould no otherwiſe be charged than *B*, to whom Goods were, as above is ſaid, delivered to be kept. For the Executor hapily ſhall have no benefit nor advantage by the Executorſhip; all the Goods not ſufficing, perhaps, to pay Debts and Legacies, which is the ſtate we moſt think of, *viz.* where Goods want to pay Debts and Legacies; for where there wants not, the queſtion needs not be made. Yet a Servant or Factor, who hath Wages for his Service, is not thereby made liable to ſatisfie for things in his cuſtody ſtoll'n, becauſe he hath not for this particular cuſtody any compenſation. So of an Executor, if perhaps benefit might accrue to him by the Executorſhip, as haply the diſcharge of a Debt owing by himſelf, *&c.* Other Caſes there be wherein the Executor will ſtand more clearly diſcharged. As

In cuſtodiâ ſua exiſtit.

if the Teſtator left a Leaſe for years, ſtate by Extent, Wardſhip, or other Goods, whereto he hath but a defeaſible Title, and they be evicted after his death: ſo if he left a Ship at the Sea with much Goods and Merchandiſes, which are drowned in the return, never arriving in ſafety: ſo alſo if he left a ſtock of Sheep tainted with the Rot, which die ſhortly after him: In none of theſe three Caſes, doubtleſs ſhall the loſs fall upon the Executor. But to put a Caſe of more doubt: What if a Leaſe for years come to an Executor ſubject to a Condition for payment of Rent, or a Sum in groſs, and the Executor fails in payment; whether ſhall this loſs fall upon the Executor to be made good to Creditors or Legatees out of his own ſubſtance or not?

To this I muſt anſwer by this diſtinction, *viz.* If the Executor had taken the profits of this Land ſo long as to furniſh him with Mony for this payment, or if he had other Goods of his Teſtator's in his hand to ſupply the payment, then it is his default that the Mony is not paid, and he muſt bear the ſmart thereof, otherwiſe not; for he is not bound to make payment out of his own Goods: yet he is

a ſul-

a ſullen and unkind Executor who will not ſo do, when as he may repay and ſatisfie himſelf by the profits thereof after. Like Law, if the Executor ſuffer a Bond of a hundred pound to be forfeit for not paying of fifty pound, having ſufficient in his hands. So alſo of a Recognizance, Statute or Judgment, deſeaſanſed upon payment of a leſs Sum. Yea, I leſs doubt of all theſe Caſes, than of the Forfeiture of the Leaſe for years: for haply the Executor had time to have ſold the Leaſe, and made Mony thereof towards the payment of Debts; the omiſſion and neglect whereof may be imputed unto him, as a Default juſtly occaſioning recompence to be by the Law required from him. But, perhaps, he may excuſe himſelf that he could not find a Chapman who would give him to the value thereof. Hereunto yet reaſon can eaſily reply, that it had been much better to have ſold it under the value, than to have loſt the whole value, by expoſing or abandoning it to a total Forfeiture. Yet Quere.

CHAP. XI.

How far and where an Executor, having Aſſets, *is chargeable or liable to Action.*

HAving conſidered what things ſhall come to Executors, and be *Aſſets* in their hands for the performance of the Will; let us now conſider what things the Executor is bound to pay, ſatisfie, or perform, and what not, where he is chargeable, and where not, this being admitted, that he hath *Aſſets*, *viz.* ſufficient wherewith to perform.

Here we will conſider of theſe parts.

1. *Of Debts by Specialty or Record.*
2. *Of Debts or Duties by Contract without Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenant by Deed or Specialty.*
5. *Wrongs done by the Teſtators.*

TOuching Debts by Specialty, which are the moſt uſual and common obligе-

obligements, it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The moſt doubt will ariſe upon Bills and ſuch Writings Obligatory made, not by Scriveners or Clarks, in common form, but by others otherwiſe, for haſte, or through ſimplicity. Thus, long ſince we find a Writing made by *A* to *B*, *Memorand.* that I have received of *B* ten pound, which I promiſe to pay, *&c.* This being ſealed and delivered, was held a good Obligation by *Brian* and *Catesb.* So if the words had been only, I ſhall pay to *B* ten pound; whether ſuch words, or the like, as covenant or grant to pay, be in the form of a Bill or Bond, or in an Indenture or Articles, it is a ſufficient ground for an Action of Debt. And though it ſhould be miſ-written, *Wigint* for *Vigint*, or fifteen for fifteen; yet ſhall it be favourably conſtrued, and held a good Specialty of Debt, as hath been reſolved in theſe and like Caſes, and ſo alſo notwithſtanding falſe *Latine* in the Obligation. or the plural number for the ſingular number, or words of repugnancy or non-ſence; yet if there be words whereby it appears

22 E. 4. 22.

19 R. 2. F. Det. 166. 9 H. 6 7. 2 H. 4. 8. 23 El. M. 5.

9 H. 7. 16. 2 H. 4. 8.

28 H. 8. Dyer 22.

28 H.8. Dy. 19 & 22. 40 E.3.1. 7 H.7.14. 8 H.6.36. 22 H.6.15. 21 E.4.81. 3 H.4.17. 11 H.4.76.

that *A* is a Debtor to *B*, and it be ſealed and delivered, it is a good Writing Obligatory; yea, though it want the words of concluſion, *viz. In witneſs whereof*, as the Lord *Dyer* reports to have been reſolved: although the contrary were held in four ſeveral Kings times before, as our Books ſhew.

Now any ſuch Writing Obligatory doth determine or drown any Duty by Contract, becauſe Specialty is of a higher nature. So as if *A* and *B* do bargain with *C* to pay him a hundred pound for Corn, or other thing, and after *C* take ſome ſuch Writing Obligatory as aforeſaid of *A*; now by this is *B* diſcharged of the Debt, becauſe he ſtood charged only by the Contract, which is extinguiſhed by the ſaid Specialty.

So reſervation of Rent, grant of Annuity. 28 H. 8. Dy. 14 & 22. 47 E.3. 22. 32 H 6. 32. 10 H.7. 18.

As for the extent and operation of theſe Specialties to and upon Executors, we muſt know that an Executor doth ſo repreſent the perſon of that Teſtator, and is ſo included in him, as that every Bond or Covenant by the Teſtator, made for payment of Mony or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor bind him and his Ex-

Executors by expreſs words, (and yet the Heir not named is not bound, though there be never ſo great *Aſſets* or Land deſcend unto him.)

No mention of Executor in the Judgment, yet he charged.

Now touching Debts upon Record much need not to be ſaid, (except of thoſe by Stat. Merchant:) for to Debts and Damages already recovered againſt the Teſtator, and to Debts by Recognizance, the Executor's liableneſs is ſomewhat clear and conſpicuous. Yet other inferiour Debts upon Record may fitly be thought of, as Iſſues forfeited, Fines impoſed by Juſtices at *Weſtm.* or at Aſſiſes, Quarter-Seſſions, Commiſſions of Sewers, or Bankrupts, by Stewards in Leets, or the like; for all theſe are Debts of Record, which Executors ſtand charged withal. So alſo if the Teſtator were before Auditors found in Arrerages of Account, being a Bailiff or Receiver; for theſe Auditors are by Statute Judges of Record: but if the Account were made only before the party to whom the Arrerage pertained, or but before one Auditor only, it is out of the Statute, which ſpeaks of Accounts before Auditors in the plural number; therefore the Executor not chargeable; becauſe the

9 H. 6. f. 11. 11 H. 4. 6. 92. Otherwiſe of a Guardian in Socage, he is out of the Stat. *W.* 2. *c.* 11. *ut credo.* Co. *l.* 10. 103

the Teſtator might wage his Law in thoſe Caſes, not in the former.

And whereas exception was before made of a Debt by Statute-Merchant, it was by reaſon that the Lord *Brook* tells us, that if the Conuſor in that Caſe be returned dead, no remedy appeareth for the Conuſee to have Execution of the Goods of the Conuſor, but only of his Lands. If this ſhould be thus, it were a very miſchievous Caſe: for many bound in Statutes have no Lands but Leaſes, and Goods of great value, and if by their death their Goods and Chattels ſhould be ſet free from this Statute, and the Creditor without remedy, the Law were defective: and it were ſo much the more ſtrange in this Caſe, becauſe the Statutes of *Acton Burnell* and *Mercatoribus* ſeem to pitch principally upon Goods, and to tend unto aſſurance between Merchants, who uſually are not Landed Men. But that the Law doth give remedy in ſuch Caſe, as well againſt the Goods as Lands of the deceaſed Conuſor, appears by the Reſolution of late made, in what Order and Precedence Statutes are to be ſatisfied by Executors, as after we ſhall ſee.

36 H. 8. Br. Stat. Mer. 43

Of

Of Debts by Contract without Deed, as Leaſes parol, &c.

CContracts are of divers kinds, and we will begin with thoſe in the realty as moſt worthy. If therefore one be Leſſee for years or for life, without any Indenture or Deed, (as he may be) and, his Rent being beind, he dieth; now is the Executor liable to the payment of this Rent without any Specialty, for that his Teſtator, if he had been ſued in his life-time, could not have Waged his Law. But if the Leſſee for years in his life-time ſell or grant away his Term or Leaſe, although he ſtill lie at the ſtake for the Rent to grow due after, until the Leſſor accept the Aſſignee for his Tenant; yet if the Leſſee die, his Executor ſhall not be charged for any Rent due after the death of his Teſtator. But what if the Leſſee do not alien or aſſign his Term, but die thereof poſſeſſed, and the Executor, perceiving the Land not to be worth the Rent, waveth the ſame, yet the Leſſor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the Executor with the Rent

21 H. 6. 1.
44 E. 3. 42.
44 E. 3. 5.
7 E. 3. 11.
14 H. 7. 4. per Keble.
Vide 8 E. Dy. 247.
M. 32 & 33 *Eliz. in Com. Ban.*
Do. & *Stud.* 121.

Rent during the Term? I answer, that if he have *Assets*, that is, sufficient for payment of this and other Debts, he cannot wave this Lease, but shall be tied to answer this Rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay Mony: Yet because it is yearly Executory, the Executor may wave it, in case his Testator's Estate will not supply and bear that loss. But what if there be *Assets* to bear this yearly loss for some years, but not during the whole Term? I think in this case the Executor must pay the Rent so long as these *Assets* will hold out, and then must wave the possession, giving notice to the Reversioner. And this I think he may do well enough, notwithstanding his Occupation of the Land divers years after the Testator's death, because that was not voluntary, but as of necessity: yet this I leave as a *Quære*, to be well advised of with good counsel.

Of Contracts personal.

WHere the Testator might wage his Law, there the Action lieth not against

againſt the Executor, as hath been touched: and therefore he is not chargeable in an Action of Debt upon a ſimple Contract, as by reaſon of this or that, to his Teſtator; yea, though it were the Inheritance of Land which was ſold, ſo as the Sale were without Deed; or though by Deed, yet if no Counterpart were under the hand of him to whom the Sale was made. And the Cuſtom of *London* to the contrary, *viz.* that an Action of Debt ſhould be maintained againſt Executors upon a Contract, was held void, at leaſt no good Plea againſt other Creditors, that ſuch a Debt was recovered againſt the Executor, or paid by him; as was towards the later end of the late Queens time reſolved, though in the beginning of her time it was a Demurrer. Yea, though ſuch a Debt grew for the moſt neceſſary thing, *viz.* Meat and Drink, which bindeth even an Infant to payment, yet will it not charge the Executor of a Man of full Age. But this is meant where the Contract was only by word: for where the Teſtator putteth his Seal to any Deed or Writing made upon ſuch Sale, this is more than a ſimple Contract, and taketh from the Vendee his wager of Law, and ſo chargeth the

41 *E.*3.13. 15 *E.*4.25. Except by a *Quo minus* in the Exchequer. So the King's Debt. *Co. l.*9. *f.* 98. *a.* So of Accounts, except for the King.

*M.*32 & 33 *El. in Com. Ba.* by three Judges, and 37 *El.* by all as I find in my Report. But *Co. l.* 5. *f.*82. *b.* it is contrarily reported. 3 *El.* Dy. 196. Demurrer. 9 *E.*4.51. 10 *H.*7.8. 15 *E.*4. 16. 22 *H.*6. 13. 39 *H.*6.186.

the Executor. But if the Teſtator ſeal but unto a Tail or Tally with ſcotches, expreſſing a Debt, this is no ſuch Specialty as ſhall charge Executors. Yet in ſome Caſes without any Seal at all the Executor is chargeable. But although no Action of Debt lieth againſt the Executor upon ſuch a ſimple Contract, yet may the Creditor in that caſe maintain an Action upon the Caſe, grounded upon the Aſſumption implied, though not expreſſed, as now ſtandeth reſolved by all the Judges of all the Courts at *Weſtminſter*, though heretofore there hath been much difference of opinion thereabout. And indeed, thus the Executor is charged in matter for a ſimple Contract, though not in manner of a Debt, but as for breach of promiſe, making recompence in Damages, in ſtead of the Debt. And the chief reaſon for it is, becauſe the Teſtator could not have waged his Law in this Action upon the Caſe againſt himſelf, though in Debt he might. Where the Teſtator retaineth Servants in Husbandry, or otherwiſe, and dieth, there being Wages due to theſe ſo retained; the Executor is liable to an Action of Debt for the ſame, by

There though a common Hoſtler or Victualler truſt his Gueſt, he loſeth his debt by his death *Co.* 9. 87. *b.* 12 H. 4. 23.

But if the Sum be alſo written on it, they are bound as by a Deed. 28 H. 8. Dy. 2. *b.* *Slade's* Caſe. *Co. lib.* 4. *Co. l.* 9. 87. *Pinchon's* Caſe.

2 H. 4. 14.

by reaſon that the parties were compellable by Statute thus to ſerve, and therefore the Teſtator could not have waged his Law: But in caſe of Servants not compellable, as Waiters or Serving-Men, as we call them, no Action of Debt lieth againſt the Executor for their Wages, though againſt the Teſtator himſelf it doth; for the Contract is ſufficient to charge him who made it. See of *Account* after.

4 H.6.48.

So 2 H.4. f. 14. Servitors in the War by Contract.

Where Executors ſhall be charged, without either Contract or Specialty.

WHere a Priſoner oweth Mony to a Gaoler or Keeper of Priſon for his Diet or Victuals, and dieth, his Executors ſhall be chargeable for this Debt, becauſe it is for the Commonwealth to have Priſoners kept, which cannot be without affording them Victuals. Alſo where one hath a Patent or Tally of the Exchequer, to receive Mony of ſome Cuſtomer, Receiver, or other Officer of the Crown, and delivereth it to him, he then having Mony of the King's in his hands: if he pay not the ſame, but die, his Executors ſhall ſtand charge-

27 H.6.4. 15 E.4.16. Co. lib. 9. f. 87. b. Nota. br. 121. e. He muſt have a *Liberate* alſo.

27 H.6. 4.b. 1 H.7.17. 2 H.7. 8. b. Clark of the Hamper. 10 H. 6. 24, 25.

chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more than one, but this is Debt of Record in Law.

No. ns. br. 82,83. *West.* 1. *c.* 35. *Lib. Intr.* 172. b.

So if any Lord of free Tenants doth levy Aid of them for the Marriage of his eldeſt Daughter, and he died before ſhe be married; ſhe may recover this Mony by an Action of Debt againſt his Executor: but this is by virtue of a Statute. There is a Preſident in the Book of Entries, of an Action of Debt againſt the Executor of an Heir, by which it ſeems that a Man binding himſelf and his Heirs, and leaving *Aſſets*, the Heir taking the profit becomes ſo a Debtor, that his Executor ſhall be charged. And in the Regiſter there is a Writ againſt the Executors of the Guardian of the Spiritualties of the Arch-biſhop of *York*, for the Debt of *B*, who died Inteſtate, and whoſe Goods came to the hand of the ſaid Guardian, *viz.* the Dean of *York*. In allowance whereof, there is a Note added of the like Writ brought in K. *R.* 2. his time, and that then a Preſident was alledged of ſuch a Writ in King *Edw.* 2. his time againſt the Executors of an Ordinary, and that they were enforced

Reg. orig. 141.

11 *R.* 2 16. *P.* 2.

to

to anſwer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* oppoſeth him. Alſo the *Rationabili parte bonorum* by cuſtom in ſome places is maintainable for the Wife and Children againſt the Executor. But no Action of Account lieth againſt Executors, except for the King. More hereof *tit. Wrong.*

11 E. 4. Fit, Ex. 77. See Co. lib. Inſt. 564. Such Actions in *Yorkſhire.*

Of Covenants charging Executors.

WE have already touched upon Covenants in part, *viz.* where they be expreſly for payment of Mony, ſhewing them to be in Law, Bonds, that is, Writings Obligatory, whereupon an Action of Debt may be brought as well as an Action of Covenant, though the words of the Deed bear the ſound and phraſe of a Covenant. Yet in ſome Caſes no Action of Debt lieth upon a Covenant to pay Mony: as if *A* Covenant that his Executor ſhall within a year, or ſuch a time, after his death pay ten pound to *B*; now for that no Action of Debt was maintainable againſt *A* himſelf, it lieth not againſt his Executor, but only an Action of Covenant; as was held in the late

Inter Andrews and Elſerig, *circitur* 33 El.

Paſch. 33 El. *inter* Bor. & Auſtin, *in Com. Ba.*

Queen's time. So if the Covenant be conditional, as thus, that if *C* do not pay to *B* ten pound, then *A* will pay it: and ſo alſo, perhaps, if the Covenant be in the disjunctive, *viz.* to do ſuch an act, or to pay ten pound: now if the Act be not done, yet no Action of Debt lieth for the Mony, but only an Action of Covenant. But now let us come to the Caſes of meer Covenants, and ſee which of them will charge an Executor, and which not. If a Leſſee for years covenants to repair the Buildings, or to pay the Quit-Rents iſſuing out of the Land let, there is little doubt but the Executor, to whom the Term cometh, muſt as well as his Teſtator perform that Covenant, although he did not covenant for him and his Executors. And yet of theſe Caſes doubt hath been: and touching the later, *viz.* of paying Quit-Rents, divers Juſtices in Queen *Mary*'s time were of opinion, that it was a thing ſo perſonal, that it died with the perſon, and did not charge the Executors; nor is there any contrary Opinion expreſſed in the Book. And ſince that time, *viz.* towards the end of Queen *Elizabeth*'s Reign, in the Action of Covenant between the Dean and Canons of *Windſor* and

Qu. If both be to be done by the Covenanter, *viz.* ten *l.* if not five, ſuch a day. So in *Penoi's* Caſe. But where the Leſſor did covenant to pay the Quit-rent, divers Juſtices thought the Executor, not named, was not bound, 1 & 2 *P.* & *M.* Dyer 114. Note the Caſe is *ſupra* in *marg. Paſch.* 38 *El. in Ban. Reg.*

and *Hide* touching Reparations, at the first much opinion was, that only the person Covenanting was tied to this performance; but after it was resolved, that that Covenant did run with the Estate, and so both Executor and Assignee were bound to performance. But in that Case it was said by *Popham*, Chief Justice, that if the Covenant had been to do a Collateral Act, neither the Executor nor the Assignee had been tied thereby: and therefore where a Lessee for years covenants within such a time to build a new House upon the Land, and dies before that time expired, I doubt whether the Executor be bound to perform this or not; although it do concern the Land let, so as perhaps the Rent or Fine was the less, in respect of this charge of new Structure or Buildings; which is a great reason that the Executor, though not named, should be tied to the performance. But if the Covenant had been to build a House elsewhere than upon the Land let, or to do any other collateral thing, not pertinent to the Land let; it is clear the Executors were not bound to perform it. And yet in those Cases, if there were a breach or non-performance in the Testator's life-time,

Co. l. 5 f. 24.

Resolved P. 39 *Eliz.* but not adjudged till *M.* 43 & 44 *Eliz.*

as that the time of performance were expired before his death, then it is clear the Executors were bound to yield recompence by way of damages recoverable in an Action of Covenant, as both *Shelley* and *Fitzherbert* agreed: and ſo alſo did the Lord *Popham* agree in the ſaid Caſe of *Hide*, as I find in my own Report of that Caſe; though in the Lord *Coke*, reporting only the Point in queſtion, that be not mentioned. Now let us conſider of the Caſe where there is no expreſs Covenant at all, ſo much as for the Leſſor himſelf, but only a Covenant implyed, or Covenant in Law, as we call it. As if Leſſee for life make a Leaſe for years, and die within the Term, ſo as the Leſſee is evicted by him in Reverſion and Remainder. In this Caſe it was reſolved in the late Queen's time by three Judges, *viz.* *Walſh*, *Brown* and *Dyer*, that by this Covenant in Law the Executors were not chargeable; and in the ſame Caſe, the Lord *Dyer* ſets down another Reſolution after to the ſame effect. But Maſter Serjeant *Bendloes* reporting this later Caſe to be of a Leaſe made by Tenant in Tail, *viz.* before the Statute of 32 *H.* 8. or not warrantable by it, ſets down the opinion

Tr. 28 *H.* 8. Dyer 14. There the Houſe was to be built upon the Land leaſed; and yet *Baldus* ſeemed of a contrary opinion.

M. 8 & 9 *El.* Dy. 257. *Intrat. M.* 7 & 8 *Eliz.* Swanno. Verſ. Strangſham & Searles.

nion contrarily, *viz.* that the Action was maintainable againſt the Executors. This may ſerve for inſtance, the like being in any other Caſe where the Leſſor hath not a good and a firm Title, but perhaps ſubject to a Condition, or other Eviction, ſo as the Leſſee cannot enjoy the Land according to his Leaſe. *Tr. 22 Eliz. Rot. 459. inter* Broderidge & Windſor.

But this muſt be ſo underſtood, that no eviction or breach of Covenant is in the life of the Teſtator himſelf; for if that be, there is no queſtion but the Executor ſtands chargeable: and therefore if one make a Leaſe of Land by Deed wherein he hath nothing, this Covenant is perhaps preſently broken; and though the Leſſor die before an Action of Covenant brought, it will be maintainable againſt his Executor, though no expreſs Covenant. This is uſeful to be known, though in theſe days there be few Leaſes ſo made, without expreſs Covenant, and the Executors alſo named. And where there is a ſpecial Covenant in expreſs words, it doth qualifie the Covenant implyed: ſo as although words of demiſe and grant tie the Leſſor to a general Warranty of the Title againſt all Men, yet it being after covenanted that the Leſſee ſhall enjoy againſt the *Nokes* and *Anders* Caſe.

Leſſor and his Heirs, or againſt all claiming under him or his Anceſtors; now no eviction by or under any other Title giveh cauſe of Action, or bindeth the Leſſor or his Executor to make recompence.

Of Wrongs done by Teſtators, and whether Executors be liable to amends.

ALthough Executors do repreſent the perſons of their Teſtators; yet if the Teſtator commit any Treſpaſs upon the Goods of another, or upon his Perſon or Lands, no Action lieth for this againſt the Executor; for *Actio perſonalis moritur cum perſona.* So if a Sheriff, Goaler or Keeper of Priſon ſuffer one in Execution for Debt or Damages to eſcape; though hereby the party at whoſe Suit the Execution was, be entit'led to an Action, *viz.* an Action upon the Caſe, againſt ſuch Officer by the Common Law, and by Statute an Action of Debt; yet if he ſo ſuffering die, for that ſuch difference was a wrong of the nature of a Treſpaſs, no Action lieth againſt his Executor for the ſame. And upon the ſame reaſon, as I preſume, if one carry away his Corn and Hay, without ſetting out the Tenth, although

41 *Aſſ.* p. 15. 40 E. 3. Fitz. Ex. 74. Co. lib. 9. f. 87. a.

though the treble value be recoverable againſt him in an Action of Debt; yet if he die before ſuch recovery, the Action is gone, and lieth not againſt his Executor; no, not although the Teſtator were a Leſſee for years, ſo as his State came to his Executor.

Like Law in other penal Statutes: as, for arreſting one at the Suit of *J S*, without his privity or aſſent; or for not appearing as a Witneſs, being ſerved with a *Sub-pœna*, and having charges tendered, and many like; yea, if a Leſſee for years commit Waſte and die, no Action lieth againſt the Executor for this Waſte. For all theſe Caſes are within the rule of *Actio perſonalis moritur cum perſona.* And many other like Caſes might be put, but theſe may ſuffice. Yet if a Parſon, Vicar, or other Spiritual or Eccleſiaſtical Perſon, do ſuffer a ruine or decay of the Houſes or Buildings upon his ſuch Spiritual Benefice or Promotion, and dieth; his Executors are liable, by the Spiritual or Eccleſiaſtical Law, to the Succeſſor's Suit for amends, to the repairing of ſuch ſpoil or decay. And becauſe ſome uſed fraudulently to grant away their Goods, ſo as nothing ſhall be left to their Executors;

it was enacted *temp. Elizabethæ*, that ſuch
13 El. c. 16. Grantees of Goods ſhould be liable to the Succeſſor's Suit for theſe Dilapidations, as if they were Executors.

As for one other Caſe of this nature, *viz.* where an Executor waſteth the Goods of his Teſtator, or an Adminiſtrator the Goods of his Inteſtate, and dieth, whether his Executor be ſubject to an Action for this, or not; I adjourn the Reader to that place where I ſhall treat of ſuch Waſting or Devaſtation by Executors.

Unto this Head not unfitly may be referred what before is ſaid of Actions againſt the Executors of the Debtor's
Fitz. Ex. 77. Heir, and the Executors of the Ordinary; for the Specialty binding to payment reacheth not to any of theſe: but becauſe their Teſtators ſhould have paid theſe Debts with the Goods or Profits of the Lands of the Debtor, and did not, but retained them to themſelves; therefore for this, as a Wrong, are they ſuable, as I take it. So alſo by the ſame reaſon are the Executors of an Adminiſtrator chargeable, where he did neither pay the Debts, nor leave the Goods to the next Adminiſtrator, but otherwiſe diſpoſed of them. Yet an Executor is not chargeable in an

I conceive no difference between this and the other Caſes *ſupra*.

Action

Action of Detinue, nor of Account, (except to the King) for the Teſtator's detaining, and not paying or anſwering things received, or under his charge.

2 H.4. 13. He may by admit. Co. l. 11. f. 88. 3 H.6. 35. *Con.* for Arrerages of an Account before Auditors. 11 H.5.64. 91, 92. 9 H.6.11. 13 E. 1.

And the reaſon why, after Account made before Auditors, and the Bailiff or Receiver be found in Arrerages and die, that in this caſe his Executor is chargeable, is, becauſe the Auditors are made Judges by the Statute *Weſtm.* 2. *cap.* 11. ſo this Arrerage which they have judged is a Debt by Record.

But if the Caſe be put on the other ſide, *viz.* that the Bailiff or Receiver have found in Surpluſage upon his Account, *viz.* that he hath laid out more in his Lord's or Maſter's buſineſs than his Receipts amounted unto, and then his Lord or Maſter dieth; now ſhall not he have any Action againſt the Executors for the Surpluſage, becauſe it is out of the purview of the ſaid Statute.

Co. lib. 9. f. 87. a.

CHAP.

CHAP. XII.

Of the Order and Method to be used by Executors in payment of Debts and Legacies, so as to escape a Devastation or charging of their own Goods.

WE have gone through and dispatched the two first proposed parts, *viz.* 1. Touching the being of Executors, and the manner of their being; 2. Their having, and the manner of their having. We come now to the third part, *viz.* Their doing or disposing of the Testator's Estate.

Now this consists principally in the issuing of Mony, though partly also in delivering or assenting to the Execution of Legacies, not being Mony, but other Goods or Chattels bequeathed.

Mony is to be issued by Executors four ways ordinarily.

About the Funeral of the Testator.

About proving his Will.

In paying of Debts.

In paying and satisfying of Legacies peculiarly.

As

As for the firſt, Burials be as of neceſſity for two reſpects, *viz.* 1. Of Charity to the dead, that he may be Chriſtianly and ſeemly interred; 2. To prevent and avoid annoiance to the living, who by the very view of the dead Carcaſes would both be affrighted, and within a few days diſtaſted at the Noſe. We know that under the Law the touching of a dead Carcaſs made a Man unclean, and to need purifying: nor can we eaſily forget what the Siſters of *Lazarus* ſaid to our Saviour touching their Brother, when he had been dead three or four days, *viz.* that the taking of him then out of his Grave muſt needs bring a noiſome Savour. Hereabout therefore ſome experience is neceſſary, and that not only for Fees to be paid, which in *London* amounts to a conſiderable Sum, ſpecially for ſuch as are to be buried within the Church; but alſo otherwiſe. *viz.* for the Pall or Hearſe-Cloath, the Ringing, *&c.* As for Feaſting and Banqueting, it ſeems not to be congruent to the ſadneſs and dolefulneſs of the Action in hand. But howſoever that be, yet where the Teſtator leaves not ſufficient Goods to pay his Debts, Feſtival expence is to be forborn,

ex-

except the Executor will out of kindneſs bear it with his own Purſe; for dead Debtors muſt not feaſt to make their living Creditors faſt. I mentioned a conſiderable amount of Funeral Fees payable in *London*: and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kind, and eſpecially for thoſe who dying there are yet carried into their Countries to be buried, the Exaction be not either unjuſt altogether, or too onerouſly exceſſive: ſo alſo for much Ringing, contrary to the Canon made at the Convocation in the firſt year of King *James*.

The next thing mentioned to juſtifie and occaſion expence is the proving of the Will. But this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a *Caveat* put in, or the like) will not ſtand allowable, than is preſcribed by the Statute made in the time of *Hen.* 8. whereby the Fees of Ordinaries, and their Scribes, Regiſters and Officers be limited. And it is ſtrange that theſe bounds have been ſo much and ſo frequently broken and tranſgreſſed, the rather, for that long before, in the time of K. *Edw.* 3. by an Act of Parliament it is pro-

21 *Hen.* 8. *cap.* 5.

25 *Ed.* 3. *c.* 4.

provided, that the King's Juſtices ſhould, as well at the King's Suit as at the partie's grieved, enquire after ſuch Oppreſſions or Extortions, for ſo they be called; yea, *St. Germ.* who was no ſtranger to the Civil and Canon Law, as appears by his Book, ſaith, that the Ordinary ought to take nothing for the Probate, if the Goods ſuffice not for Funeral and Debts; but he means only that Conſcience is againſt it. *Do. & Stu. l. 2. cap. 10.*

Now we come to the third occaſion of Diſburſement, *viz.* payment of Debts, which is the main part of our buſineſs. We have before ſeen what Debts lie upon Executors, having *Aſſets* to pay them; we are now to ſee in what order they muſt pay them, as well *ut ſint fidi diſpenſatores*, as for their own indempnity, *ne quid res ſua capiat detrimenti*. To put our ſelves into the better order or method of handling theſe things, we will ſort our Debts into their ſeveral kinds: Thus,

They are of theſe three ſorts, *viz.* either
Debts of or upon Record;
Or, Debts by Specialty;
Or, Debts without Specialty.

The Debts upon Record may be again divided into four ſorts or kinds, *viz.*
Debts to the King or the Crown.

Debts

Debts by Judgment or Recovery in ſome Court of Record.

Debts of Recognizance.

Debts by Statute-Staple, or Statute-Merchant.

Amongſt theſe, the Debts of the Crown are to have the firſt place of precedence; ſo as if there be not come to the Executor Goods of greater value than will ſuffice for the ſatisfaction of theſe, he is not to pay any Debt to a Subject; and if he be ſued for any ſuch, he may plead in Bar of this Suit that his Teſtator died thus much indebted to the King, ſhewing how, *&c.* and that he hath not Goods ſurmounting the value of that Debt. Or, if the Subjects purſuit be not ſo by way of Action, as that the Executor hath day in Court to plead, but be by way of ſuing Execution, as upon Statute-Merchant or Staple; then is the Executor put to his *Audita Querela*, wherein he muſt ſet forth this matter. And there is great reaſon why the King's Debts ſhould thus be preferred before any Subjects, *viz.* for that the Treaſure Royal is not only for ſuſtentation and maintaining of the King's Houſhold, but alſo for Publick Services, as the Wars, *&c.* as appears by the Statute

M. 33 *&* 34 *Eliz.* the Lady *Wolſingham's* Caſe *in Com. Ban. & Tr.* 39 *Eliz.*

tute 10 *Rich.* 2. *cap.* 1. And therefore it is, as I conceive, that *Bracton* ſaith of the Treaſures or Revenues Royal, *Roborant Coronam*, they do ſtrengthen or uphold the Crown. And for the like Reaſon, as I think, did God enact touching the poſſeſſions of the Crown, that if they were given to any other than the King's own Children, they ſhould revert and come back to the Crown the next Jubilee, which was once in fifty years. *Sed de hoc ſatis.* But this priority of payment of the King's Debt before the Debt of any Subject, is to be underſtood only of Debts by or upon Record due to the King, and not of other Debts. If any ask how the King ſhould have any Debts which ſhall not be of Record, ſince by the Statute 33 of King *Hen.* 8. Chap. 30. it is enacted, that all Obligations and Specialties taken to the uſe of the King ſhall be of the ſame nature as a Statute-Staple: To this I anſwer, that there may be Sums of Mony due to the King upon Wood-ſales, or ſales of Tin, or other his Minerals, for which no Specialty is given; ſo alſo for Amercements in his Courts-Baron or Courts of his Honours, which be not Courts of Record; the like of

Lib. 1.

21 *E.* 4. 21, 22. So muſt it be pleaded *M.* 33 & 34 *Eliz.*

Fines

Fines for Copy-hold ſtates there; ſo of the Mony for which Strays within the King's Mannors or Liberties are ſold. Alſo, as the Law hath lately been taken and ruled in the Exchequer, even Debts by Contract due to any Subject are by his Outlawry, or Attainder forfeitable to the Crown. Yet neither theſe, nor thoſe due to ſuch perſon out-lawed or attainted by Bond, Bill, or for Arrerage of Rent upon Leaſe, are or can be any Debt of Record, until Office thereupon found; for although the Outlawry or Attainder be upon Record, yet doth it not appear by any Record, before Office found, that any ſuch Debt was due to the perſon outlawed or attainted. Thus are not theſe Debts to the Crown to have priority of payment before the Subject's Debts, though the King's Debts of Record are ſo to have. So that if a Subject to whom the Teſtator was indebted by Specialty ſue for this Debt, the Executor muſt plead, that the Teſtator died indebted thus much to the King by Record, more than which he left not Goods to ſatisfie; if the truth of the Caſe be ſo: for if there be ſufficient to ſatisfie both, then the Subject Creditor is not to ſtay for his Debt till the King's Debt

And muſt plead the Record in certain, as was held in the Caſe of the Lady *Walſingham M.* 33 & 34 *Eliz.* But it ſufficeth to ſay, by a Record of the Exchequer, as was held *Tr.* 39 *Eliz. in Ban. Reg.*

Debt be levied. And if the Subject Creditor ſue Execution upon a Statute, ſo that the Exec. hath no day in Court to plead this Debt to the King, then is the Exec. put to an *Audita Querela*, wherein he muſt ſet forth that matter, and ſo provide for his own indempnity. But what ſhall we ſay of Arrerages of Rent due to the King? Surely, where it is a Fee-farm Rent, or other Rent of Inheritance, I ſee not how it can come under the title of Debt, ſince for it no Action of Debt is maintainable ſo long as the State continueth in him to whom it grew due; and I find that the L. *Dyer*, *M.* 14 *Eliz.* ſaid, that the King could but only diſtrain for his Rents, and not otherwiſe levy them of Lands and Goods; and that the King by his Prerogative may diſtrain in any other Lands of his Tenant, our Books tell us, but no more. Yet I know it hath been otherwiſe done of late in the *Exchequer*, which if it have been the ancient and frequent uſe of the *Exchequer* it will ſtand as Law, though unknown to the L. *Dyer*. Now Rent upon a Leaſe for years differeth from the other, ſince for the Arrer. thereof an Action of Debt lieth. But how can either of theſe be Debts of Rec. when the not payment may

be either in the Court of *Exchequer*, or to the Receiver general or particular? And how then can there be any certain Record of the not payment, ſo as to make any certain Debt upon Record?. We know Statutes have been made to make the Lands of Receivers ſubject to ſale, for ſatisfaction to the Crown; and beſides that, ſome ancient Patents direct the payment of Fee-farms into the hands of Sheriffs. The Stat. of *Weſtm.* 1. *cap.* 19. provides remedy for the King againſt Sheriffs not anſwering the Debts of the Crown by them received: ſo as the King's Farmer or Debtor may have paid his Rent, or other Debt, and the Crown have not yet received it. Of Fines and Amerciaments in the King's Courts of Record, there is no doubt but they are Debts of Record.

Come we now to the Debts of Subjects, and firſt thoſe of Record. Touching which I ſhall not be able to hold ſo good a Method, and ſo well to handle things by parts, as I would; for that the parts ſo ſtand in competition one with another for precedency, as that they muſt of neceſſity thereabout conflict and interplead one with the other, and conteſt one againſt the other: yet for the Readers better eaſe, and

ability

ability to find out that which may concern him in his particular caſe, I will, in the beſt ſort I can, ſingle out theſe things into ſeveral parts, and place them in ſeveral rooms or ſtations. Firſt, conſidering how it ſhall ſtand between one Judgment and another, had either againſt the Executor or Teſtator. Secondly, how between Judgments and Statutes or Recognizances. Thirdly, how between Recognizances and Statutes. Fourthly, how between one Recognizance and another. Fifthly, how between one Statute and another. Adding to each ſome Obſervations incident.

Now, next to the Debts of the Crown, are Judgments or Debts recovered againſt the Teſtator to have priority or precedency in payment, as being of an higher nature or more dignity than any other: for that Statutes and Recognizances, though they make Debts upon Record, yet are they begotten but by voluntary conſent of parties; whereas in every Judgment there hath been a courſe and work of Juſtice againſt the will of the Defendant as is preſumed, and this in a Court of Juſtice, and the Records of ſuch Judgments are entred in publick Rolls, not kept or

carried in Pockets or Boxes, as Statutes, as until Inrolment Recognizances are. Therefore Executors muſt take heed that Judgments againſt their Teſtators, (before Debts any other way) if they have not ſufficient for both, be firſt ſatisfied, leſt they draw the burthen of this Debt upon their own backs. Now their way to help themſelves, being ſued or purſued for other Debts, is the ſame before delivered touching Debts upon Record to the Crown, *viz.* by Plea, where they may plead, as in *Scire facias* upon a Recognizance, or Suit upon Bond; and by *Audita Querela*, where they cannot plead, as when Execution is ſued upon a Statute. And if they had no warning in the *Scire facias*, but upon *Nihil* returned the Judgment paſſed, there alſo the Exec. may be relieved by *Audita Querela*; becauſe there was no default in him that he did not plead, or ſet forth the Judgment upon the Suit in the *Scire facias*. Nor will it be any Plea for the Creditor by Stat. to ſay, that his Statute was acknowledged before the Judgment, and ſo is more ancient; for a later or more puiſne Judgment is to be preferred before a Statute in time precedent. But if this Judgment be ſatisfied, and is only kept on

Co. l. 5. f 81. So Wray and Gaudy, inter Bond and Bales, 28 El. vel circiter.

Yea though a Writ of Error by the Exec. to reverſe the Judgment, yet ſuffering a Stat. to be executed, muſt pay of his own. *Read and Beecklock's* Caſe, P. 43. *El. 2* Barre. So held in *Reads* Caſe *ſup. a. Vide 12 H. 7. Kel.* 24, 25. to like purpoſe.

Co. l. 4 f 59. So Periam in C. B. inter *Charnock & Winſly, 34 Eliz. vel circiter.*

on foot to wrong other Creditors, or if there be any Defeaſance of the Judgment yet in force; then the Judgment will not avail to keep off other Creditors from their Debts. And thus much touching Debts by Judgment, *viz.* how they ſtand in priority before other Debts by Statute or Recognizance. Now to ſee how they ſtand among themſelves, let this be obſerved, *viz.* That between one Judgment and another had againſt the Teſtator precedency or priority of time is not material; but he which firſt ſueth Execution muſt be preferred, and before any Execution ſued it is at the Election of the Exec. to pay whom he will firſt: yea, if each bring a *Scire facias* upon his Judgment, the Exec. may yet confeſs the Action of which he will firſt, notwithſtanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the Defendant may plead generally, that he hath fully Adminiſtred before the *Scire facias* brought, without ſhewing that he did adminiſter in payment of Debts of as high nature; yet that muſt be proved upon the Evidence, elſe the Trial will fall out againſt the Exec. Thus have I delivered the moſt material things, in my appre-

Co. l. 5. f. 28. Co. l. 8. f. 132 So held in 15 & 16 El. So in the *Scire Facias* by *Bond* againſt *Bal s* it was held.

henſion, touching Debts by Judgment: yet thereabout I will add, for the better information of the Reader not ſtudied in the Law, theſe few things. Firſt, that what hath been ſaid, is only to be underſtood of Judgments againſt the Teſtator, and not of any againſt the Executor himſelf; for of thoſe, being but Debts of Specialty at the time of the Teſtator's death, we ſhall ſpeak after. Secondly, what is ſaid of the Teſtator, in caſe of an Executor immediate, is likewiſe to be underſtood of the Teſtator's Teſtator, in caſe of the Executor of an Executor: for where *A* makes *B* Exec. and *B* makes *C* Exec. there the Goods which came from or were left by *A*, be not in the hands of *C* liable to Judgment had againſt *B*; nor, on the other ſide, are the Goods of *B* in the hands of *C* ſubject to the Judgments had againſt *A*. And the like is to be underſtood of Statutes, Recognizances and Bonds, as elſewhere is ſomewhat touched. Thirdly, Recoveries or Judgments by meer confeſſion, without defence, are yet of the ſame nature, and to have the ſame reſpect, as other Recoveries upon Trial or otherwiſe: for though they may ſeem to be but of the nature of Recognizances, which be *debita recog-*

9 E. 4. 14, 15. *Qua.* of Arrerages of account before Auditors without Suit; for the Executors are charged by Judgment of the Auditors by Stat. *W.* 2. Judgment of Record.

10 *H.* 6. 24, 25. *Bro. det.* 183.

recognita; yet do they differ from them, in that here a Debt is demanded by a Declaration which is intended true, and that therefore the Defendant cannot deny it; but in case of a Recognizance it is not so, for there usually no Action is entred, nor Debt demanded. Fourthly, the foreshewed respect to debts by Judgment is not to be inclosed within *Westminster-Hall*, and be restrained to the four Courts there, but may and must extend it self to Judgments in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter or Prescription to hold Plea of Debt above forty Shillings, as in *London*, *Oxford*, &c. For although there Execution cannot be had of any other Goods than such as be within the Jurisdiction of that Court; yet if the Record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the *Benches*, so Execution may be had upon any Goods in any County of *England*. Fifthly, in Case where the Testator was bound in a Recognizance, and a *Scire facias* brought against him, and thereupon Judgment given; although this Judgment be not, *quod recuperet*, as in case of Actions of Debt, but, *quod habeat executionem*;

Quære of Judgment in a Writ of Annuity for Arrerages after.

nem; yet ſince Execution is the life, fruit and effect of all Judgments, this may now well ſtand for a Debt by Judgment, as I take it.

Of Recognizances and Statutes.

NExt unto Debts by Judgment are thoſe by Stat. or Recognizance to be regarded by the Executor. And becauſe I find no difference of priority or precedency between theſe two, I therefore rank them together: yet one reaſon of preferment given to Judgments before Statutes in *Harriſon*'s Caſe, *viz.* that the one remains a Record upon a Roll in the King's Court, whereas the other being carried in the Pocket of the Conuſee is more private; this, I ſay, ſhould give priority alſo to Recognizances before Statutes: As alſo another reaſon, for that Statutes are not properly Records, but Obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the Stat. is the more expedite remedy, ſince thereupon Execution may be taken out without a *Scire facias* or other Suit, which cannot be in the Caſe of a Recognizance: for there, if a year be paſt after the Acknowledgment, no Execution can be ſued out againſt the party

party himſelf acknowledging it, without a *Scire fac.* firſt ſued out againſt him; and if he be dead, then though the year be not paſt, yet muſt a *Scire facias* be ſued, and thereupon the Executor Defendant may plead ſome Plea to hold off the Execution for a time. But, this notwithſtanding, the Executor may ſatisfie the Recognizance before the Statute, at leaſt if he do it before Execution ſued thereupon; for they ſtanding in equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were firſt or more ancient; nor between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though as touching the Lands of the Conuſor it doth; but as for his Goods in the hands of his Executor, whoſoever firſt getteth hold of them by his Execution, ſhall have the preferment. And before ſuing of Execution, the Executor, may give precedence or preferment to whom he will. But now ſome may object, that there is no courſe nor Writ of Execution for any ſuch Conuſee againſt the Executor; and if ſo, then Statutes-Merchant and of the Staple are in vain ſpoken of, and it is true that Maſter *Brook*,

Before *Sci. fac.* not after voluntarily, but if levyed by Writ of Extent is good.

Bro. No. c. 294. & Stat. Mer. 43. *Brook*, after Chief Juſtice of the *Common Pleas*, in his New Caſe, profeſſeth, that he knew not any remedy for the Creditor out of the Goods of the Conuſor after his death. But if this ſhould be ſo, the Law were very defective, ſince the ſubſtance of many, eſpecially of Merchants, for and among whom the Statute-Merchant was provided, conſiſteth uſually more in Goods than Lands: beſides, the Plea of *Harriſon*, Adminiſtrator of the Goods of *Sidney*, in Bar of *Green*'s Action of Debt upon an Obligation, *viz.* that the Inteſtate ſtood bound in a Statute-Staple to *J S*, and *Green*'s Reply thereunto, that there were Indentures of Defeaſance, no Covenant whereof was broken, and the Reſolution of the Judges, that the ſaid matter in the Replication was good to avoid the Defendant's Plea; all this, I ſay, (and the Reſolution of the Judges of the *Common Pleas* in that Caſe, and in the Caſe between *Pemberton* and *Barram*, as alſo in the *King's Bench* by *Popham* and the reſt of the Judges, that Executors muſt ſatisfie Judgments before Statutes, and Statutes before Obligations) had been idle, and ſavouring of groſs ignorance, if no Execution at all

Co. l. 5. f. 28. b. H. 30 El. Rot. 119.

P. 32 El. rot. p 35. in co. b.

all could be had againſt the Executor of him bound in a Statute; and then ſhould *Green* have demurred upon the Plea of *Harriſon*, and needed not to have pleaded that other matter: but none of the Judges or Serjeants ever conceited any ſuch matter. That which there was replied, *viz.* that the Statute was not forfeited, is here to be remembred as good matter both againſt Statutes and Recognizances; and that whether the Recognizance have a Defeaſance, or a Condition not broken, ſo that the Recognizance is not forfeited. In none of theſe Caſes is the Executor hindered from payment of Debts by Specialty, nor can he be juſtified or excuſed if by colour thereof he refuſe ſo to do: and indeed elſe might Creditors be exceedingly defrauded by Recognizances for the peace and of good behaviour, *&c.* and ſo by Statutes for performing Covenants touching the enjoying of Lands, if theſe ſhould keep off the payment of Debts; and yet themſelves perhaps never be forfeited, nor the ſums become payable.

See *Co. lib.* 5. 91. Execution againſt an Exec. upon a Statute *Semaine's* Caſe.

Co. lib. 5. *f.* 28. So if ſatisfieds though not diſcharged.

Of

Of Debts by Specialty.

NOw come we to Debts due by Specialty, *viz.* Bond or Bill, (of which nature the greateſt number of Debts are.) Let us then ſee what courſe the Executor muſt or may hold for ſatisfaction of theſe, admitting that the Teſtator ſtood not indebted to any Record, or that no forfeiture is of any ſuch Debt, or that there be Goods in the Executor's hands above the Amount of ſuch Debts by Record. This, I ſay, *dato*, then according to the Rule, *Proximus quiſque ſibi*, the Executor may firſt ſatisfie himſelf of ſuch Debts as the Teſtator by Specialty owed him: for ſuch Debts are not releaſed by the Creditor's taking upon him to be Executor to the Debtor; though, on the other ſide, if the Creditor make his Debtor Executor, this is a Releaſe of the Debt. Although it be given out or commonly ſpoken in the general, that an Executor may firſt pay himſelf; yet it is to be underſtood with this caution or condition, *viz.* That the Debt to him be of equal height or dignity with the Debts to others, according to the Rule, *In æquali jure, melior eſt conditio*

tio poſſidentis: for if his Teſtator were indebted to other Men by any Statute, Judgment or Recognizance, and to him whom he maketh Executor only by Bond or other Specialty; then may he not firſt pay himſelf, that is, by paying of himſelf leave them unpaid whoſe Debts are of an higher nature; but if there be ſufficient for ſatisfaction both to them and himſelf, then is it not material which he firſt payed. Now touching the Debts to other Men, the Executor hath power to give preferment in payment to whom he will: ſo that if the Teſtator left but 100 *l.* being indebted to *A* 100 *l.* and to *B* 100 *l.* by ſeveral Obligations; the Executor hath power to pay *B* his whole Debt, and to leave *A* altogether unpayed any part of his Debt, ſo as he have not commenced any Suit before payment to *B*. But yet herein this difference is to be taken and obſerved by Executors, that if the time of payment upon the Bond of *B* were not come at the time of the Teſtator's death, then may not the Executors, before the Mony to *B* become payable, pay him, and leave *A* unpaid, whoſe Mony was preſently due. Yet if *A* forbear to demand or ſue for his Debt till the Debt of *B* become alſo payable; then is

28 *H.*8. Dy. 22. Doct. & Stud. *c.*10. *p.* 78.

is it at the will of the Executor to pay whether of them he will, ſo as the other may loſe his whole Debt, if the Goods will not ſuffice to pay both? What if *A* have only by word demanded his Debt, and not by Suit, before the Debt to *B* become payable? whether doth that hinder that the Executor may not now, when the Mony to *B* is alſo payable, pay him, and leave *A* unpaid? And hereunto *S. Germ.* anſwereth negatively, making this verbal demand to be idle, and of no value: yet he addeth, that if *A* have commenced Suit before the Debt to *B* become payable, yet if the Executor can delay the Suit till the Debt of *B* become payable, ſo that *A* can get no Judgment before that time, and before *B* hath commenced Suit upon his Bond, then may the Executor confeſs his Action, and ſo pay his Debt, leaving *A* unpaid. But of this I make ſome doubt, for that I find in 9 of King *Edw.* 4. ſome Admittance, that if *A* having a Tally, Patent, or other Warrant from the King, for receipt of Mony of or from a Cuſtomer or Receiver, where other had like Warrants before him, but *A* maketh the firſt Demand; now muſt the Officer firſt pay him,

Do. & St. *p.* 78. *Quære*, if then he may not plead this Judgment *poſt ult. contin.* againſt *A*, as he may plead it againſt other Suits after commenced. Co *lib. Intr.* 148, 269, 149. *a.*

him, or elſe himſelf ſhall become Debtor to him, if he firſt pay others whoſe Demands were after made, though they had Warrants before *A.* Likewiſe there is, as to me ſeems, ſome Admittance in the ſame Book, that the very Demand made by a Creditor of his Debt from an Executor, who hath then *Aſſets* in his hands, doth entitle the Creditor to recover damages againſt the Executor out of his own Goods: which if it be ſo, then doth even the verbal Demand lay ſome tie or obligation upon the Executor for payment. But hereabout I lay down nothing peremptorily. We partly may diſcern by the Premiſſes how the Executor is to guide himſelf, in the caſe where there be divers Debts by Specialty all due and payable at the Teſtator's death, before any Suit commenced for any of them: for in that caſe clearly the firſt verbal Demand gives not any precedence, all being due, and ſo ſtanding in equal degree. And this is implied in many Books, making the commencement of the Suit only that which entitles to priority of payment, or at leaſt reſtrains the election of the Executor. Yet, admit that one Creditor firſt doth begin Suit, if others

41 *E.*3.Fitz. *Ex.*68.6&7 *El.* Dy.232. *Vide* 21 *H.*7. Kelw. 74.

5 *Hen.*7. 27. So *Walmſley* Juſt. P. 39 *Eliz.* in Error *a.* Serjeants Inn. Co. *lib. Intr.* 286. ſuch a Recovery by Confeſſion is pleaded againſt another, and admitted good, *&c.* 148-149. Do. & St. *p.* 78. *b.*

others alſo after ſue before he be paid, or have Judgment; now cannot the Executor pay him firſt who firſt commenced Suit, but he who firſt hath Judgment muſt firſt be ſatisfied. And the Executor may herein yield help to one before the other, *viz.* by Eſſoigns, Emparlances or dilatory Pleas to the one, and by quick Confeſſion to the other's Action: for he is not bound againſt his will to ſtand out in Suit, and expend Coſts, where the Debt is clear: nor is this Covin, but lawful Diſcretion, which Conſcience will alſo approve, ſome good conſideration inducing. Nay, after Suit commenced, yet until the Executor have notice thereof, he may pay any other Creditor, and then plead that he hath fully adminiſtred before notice. Nor is the Sheriffs return of Summons or Diſtreſs ſufficient cauſe of notice; for the Summons might perhaps be upon his Land: but if it were to his perſon, it is notice ſufficient; and then, to ſave himſelf he muſt ſay, that he was not ſummoned till ſuch a day before which he had fully adminiſtred. Yet doubtleſs the Executor may be arreſted at the Creditor's Suit in ſome ſort, which yet ſhall be no ſufficient notice of this Debt.

Debt. As for the purpose, if he be sued by *Latitat* out of the *Kings Bench*, this, supposing a Trespass, gives no notice of a Debt, so also of a *Sub-pœna* out of the *Exchequer*; but the Original returnable in the *Common Pleas* expresseth the Debt, and so in some sort doth the Process thereupon. And there it seems by some Books, that if it be laid in the same County where the Executor dwells, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way: and although, to make it more clear, the Executor in King *Hen.* the fourth his time, estranging himself from notice of the Suit before payment to others, did alledge, that the Action was laid in a forein County; that is no great proof, that if his abode had been in the County where the Action was brought he must have taken notice; but thus it was clearer, and a little superfluage hurts not.

So also was it said *Tr.* 29 *Eliz.*

Now between a Debt by Obligation and a Debt for Rent or Damages upon a Covenant broken, I conceive no difference, nor any priority or precedency; but it is at the Executors discretion to pay first which he will, as if all were by Bond. So also

of Rents behind and unpaid, as I conceive; but touching them, principally intending Rents upon Leaſes for years, divers conſiderations are to be had, and ſome Diſtinctions to be made. As firſt, between Rent behind at the time of the Teſtator's death, of which that before ſaid is to be underſtood, and that which groweth behind after; next between Suit for the Rent by Action of Debt, and Diſtreſs and Avowry. As to the firſt difference, if the Rent grew due ſince the Teſtator's death, then is it not accounted in Law the Teſtator's Debt; for only ſo much is in Law accounted *Aſſets* to the Executor, as the profits of the Leaſe amounted to over and above the Rent; ſo as for that Rent ſo behind the Executor himſelf ſtands Debtor, as hath been reſolved, and therefore he is ſuable in the *Debet* and *Detinet*: whereas for Rent behind in the Teſtator's life, and all other the Debts of the Teſtator, he muſt be ſued in the *Detinet* only. Hence it muſt follow, as it ſeems, that an Executor ſued for Debt upon a Bond or Bill cannot (except in ſome ſpecial Caſes) plead a payment or recovery of Rent grown due ſince his Teſtator's death; though of Rent behind at the time of his death it be otherwiſe. And

yet

yet here again another difference or distinction is to be taken, *viz.* where the Profits of the Leaſe exceed the Rent, and where the Rent is greater than the yearly value of the Profits; for even there, as elſewhere is ſhewed, the Executor, if he have *Aſſets*, is tied to the holding of the Leaſe, and payment of the Rent, and conſequently, doth ſo much of that Rent as exceeds the yearly Profit ſtand in equal degree the Teſtator's Debt, with other Debts by Specialty. And yet again to re-conſider this Point, what if the Debts of the Teſtator by Specialty payable preſently at his death, or before the time that any Rent can grow due upon this Leaſe, ſhall amount to the full value of the Teſtators Goods; may not then the Executor, though he do not pay thoſe Debts before the Rent-day, (for that would make the Caſe clear) wave the Term? for if he may, then haply if he do not ſo, but ſhall by payment of any of this Rent want Goods to pay any part of the Debts by Specialty, it may lie upon himſelf and his own Goods, as happening by his own default. But on the other ſide it may be ſaid, that he could not wave it ſo long as he had *Aſſets*, becauſe thereby he ſtood equally liable to pay that Debt, be-

ing once due, as the other Debts by Specialty. On the other ſide it may be ſaid, that though the Debts for Rent and upon Bond ſhall be admitted to be in nature equal; yet the Caſe being put of Rent not due at the time of the Teſtator's death, it was not then a Debt nor Duty, whereas a Bond makes a preſent Debt and Duty, though not preſently payable, the day of payment being not yet come; ſo as this later is diſcharged by a Releaſe of Debts or duties, and ſo is not the former. So to leave that Point unreſolved, let us next ſee whether in ſome caſe, though the Rent exceed not the yearly value of the Land, yet even that payable after the death of the Teſtator may not ſtand in moſt part, if not wholly, upon the Teſtator's ſcore, as his Debt, as well as if it had been payable before his death. *Poſito* then that the whole or half year's Rent is payable at the *Annunciation* of our Lady, and that the Teſtator dieth two or three days or ſome like ſhort time before that Feaſt; now certainly ſhould the Law be unreaſonable, if it ſhould lay this debt upon the Executor's ſhoulders, in reſpect of thoſe few Winter-days profits which he took. But ſurely, ſince the taking of the Profits induceth

the

the Law to lay the Rent upon the Executor as his own Debt; therefore, as where the Executor had the profits for the whole year or half year, except ſome few days incurred in the Teſtator's life-time, thoſe few days will be unregarded, according to the Rule, *De minimis non curat Lex*, and the whole Rent ſhall lie upon the Executor as his own Debt; ſo on the contrary part, when the whole year or half year's Profit, except ſome few days, incurred after the Teſtator's death, the Rent, becoming payable ſo inſtantly after the Teſtator's death, muſt in reaſon lie wholly upon the Teſtator's Eſtate, as to me it ſeems. What if to this I add, that the Teſtator's Cattel wherewith the ground was ſtocked do depaſture and devour the Profits all the time after the Teſtator's death, till the day of payment of the Rents? Nay, if the Rent were payable at *Mich.* and the *Annunc.* and the Teſtator dies a few days after *Mich.* the Rent being of or near the value of the Land, it will then be hard that the Exec. ſhall for this Winter-profit pay the Rent out of his own Purſe, eſpecially if the whole years Rent be payable at that one day, as in ſome Caſes it is; or if the whole years Profits were taken in

the Summer, as in caſe of a Leaſe of Tithes. It is ſo alſo of Meadow-grounds, uſually drowned in the Winter. So if the Leaſe be then to end, not having a Summer half-year to ſucceed and make amends for the Winter: or if the Winter half-year be the later half, the Leaſe beginning at *Lady-day*, ſo that there is but a Summer for each Winter following, and not any for the Winter paſſed. Of like conſideration with theſe is the caſe of a Leaſe of Woods for a Rent, which being fellable but once in eight or nine years, now if, the Leſſee having made the laſt Sale and Felling before his death, the Law ſhould caſt the Rent upon the Executor's own Eſtate for the time future, it ſhould lay loſs upon him; which is againſt Reaſon, and contrary to the nature and diſpoſition in the Law, even in this particular: as appears by this, that ſhe enables an Executor to pay himſelf before any Debt of equal nature, ſo as ſhe more tenders an Executor's indempnity than any other Creditor's. Therefore I think that, with and upon the differences above ſhewed, even Rent grown due after the Teſtator's death may in ſome caſes be the Teſtator's debt, payable equally with debts by Bond,

Bond. But here I conceive, that if the Executor were in such case of destitution of *Assets* as might justifie his waving of a Lease over-rented, he then may wave the term's residue; because for the future the Profits will come short of answering the Rent, though at the first, and so in the total, the Profits did exceed the Rent. And if for want of waving where he might, this Rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good Administration; for *Ignorantia Juris non excusat.* This is pertinent to our present consideration, which Debt may with safety be paid, leaving another unpaid: and the hazard of Executors by ignorance of the Law hath been a principal motive to my writing these Discourses in *English.* Hitherto we have only considered, as I think, of Rents as they be recoverable by Action of Debt. Now let us see if there may not be somewhat different considerations touching distraining for Rent, and so coming to recover it by Avowry. Put we then the case that an Executor hath fully administred in payment of Debts by Bond, and after the Lessor or Reversioner cometh and distraineth for Arrerages of

Rent due in the Teſtator's life; can the Executor in bar of the Avowry plead fully Adminiſtred, as he might have done if an Action of Debt had been brought for theſe Arrerages? Doubtleſs I think no; nothing ſhall hinder the levying of the Rent upon the Land, as long as it is enjoyed under the title of the Leaſe, except the Land come to the King, upon whoſe poſſeſſion no diſtreſs can be taken. I think therefore that the Executor, who pay'd out of his own Purſe to the value of this Leaſe, (for ſo I intend the Caſe, and elſe could he not have fully Adminiſtred, as in the Caſe was put) ſhould have abated in the price and valuation of the Leaſe as well the Arrerages of Rent, as the Rent futurely payable, both being equally leviable upon the Land; and if he ſo have done, he is no loſer by payment of this Arrerage; but if, truſting to the power of an Executor and to the Plea of Fully Adminiſtred, he did not ſo, but diſburſed, in reſpect of the Leaſe, to the full value without ſuch Abatement, he muſt bear the loſs of his own ignorance. He might alſo another way have helped himſelf, *viz.* by payment of that Arrerage, leaving other Debts by Specialty unpay'd. And what if Suits were pre-

preſently commenced upon the Teſtator's death, before he could make payment of the Rent behind? whether might the Executor then plead this Debt for Rent, as he might a Debt by Judgment or Statute? Surely methinks it's probable that he might, becauſe it is a Debt from which he cannot be freed by payment of the other Debts ſued for by Specialty. If the Reverſioner would alſo commence Suit before Judgment had for the Creditor by Specialty, then might the Executor help himſelf by confeſſing his Action firſt: but this perhaps the Reverſioner would not conceive ſafe for him, ſince that way the others might get Judgment before him, and ſo he might loſe both his Suit and his Debt; whereas holding himſelf to the courſe of Diſtreſs, the Leaſe continuing, he hath Land at the ſtake for his Debt. What if he diſtrain and avow? may not now the Executor pay him, or at leaſt confeſs his Action or Avowry, ſo as he firſt having Judgment may firſt be ſatisfied? Surely after Suit commenced I ſee not how the Creditors by Bond can ſo be prevented, at leaſt without Judgment had for the Rent, yea though ſuch a Judgment he had; yet becauſe the Judgment in that caſe is not, that he ſhall recover the

the Sum due for Rent, but only that he ſhall have a return to the Pound of the Cattel diſtrained for the Rent, it is queſtionable whether the payment thereupon of the Rent ſhall prevent the Judgments after had in the Suits upon Bonds. But I think it ſhall; becauſe although it be not an expreſs Recovery of the Rent, yet it is ſuch a Judgment compulſory for the ſame as makes the payment inevitable and of neceſſity. And where before we have made the queſtion only between the ſaid Rent-debt, and the Debt by Obligation; let us now put the Caſe between the Rent-debt, and the Debt by Statute or Judgment. If then the Leſſor, after death of the Leſſee, diſtrain for the Rent behind part of the Teſtator's Cattel, and after there come a Writ of Execution upon a Judgment or Statute of the Teſtator's; whether ſhall theſe Beaſts in the Pound for Rent be delivered in Execution or not, admitting that without them there be not Goods ſufficient for ſatisfaction of the Judgment or Statute? And ſurely I think they cannot be delivered in Execution. Firſt, for that they are in the cuſtody of the Law, as in *Stringfellow*'s Caſe, though there the King's Prerogative

See 13 R. 2. Bro. *Pledges* 31. Attainder of the party diſtrain'd ſhall not take away the Diſtreſs. *Vi. Dy.*

rogative overtopped that point. Yea ſo I think, though they be replevied, for that they are to be returned to the Pound, if Judgment paſs for the Avowant, to which purpoſe Security is given; ſo as they are but in the caſe of a Priſoner bailed, who ſtill is in ſome ſort in cuſtody. Secondly, for that this Rent incident to and deſcendible with the Reverſion breeds a debt of a real nature, and ſo of more dignity and worth than Debts perſonal. Thirdly, for that the Land let (as in a ſort Debtor) ſtands chargeable with this Diſtreſs from the very time of making the Leaſe, as either by Contract real of *quid pro quo*, or rather by an operation of Law or Legal Conſtitution, or ancient Cuſtom of the Realm, without any Contract of perſons. Laſtly, for that the Leſſor doth not diſtrain the Cattel therefore, or in that reſpect, for that they are or were the Goods of the Teſtator, but for that he found them levant and couchant upon the Land which muſt afford his Rent, or a Diſtreſs for it if behind; ſo as if they had been any Under-Tenant's or Stranger's Cattel, they might have been diſtrained. Some may perhaps object this

this reaſon why theſe impounded Cattel ſhould be delivered in Execution, *viz.* for that where otherwiſe the Creditor by Statute or Judgment ſhould loſe all or part of his Debt, yet by this Relief done to him ſhall not the Leſſor loſe his Rent, for that he may at any time after diſtrain any Goods or Cattel found upon the ground at any time during the continuance of the Leaſe. But here, beſides the point of delay and ſtay for this Rent, which to many is the ſole means of maintaining their Houſholds and Families, this farther is conſiderable, that perhaps the Leaſe may be near expiring, perhaps ſo highly racked and rented even to or above the value, as that the Executor having his Teſtator's ſtock taken from it and him by Execution, will not ſtock it any more, and ſo the Land lying freſh, if the Leſſor ſhall loſe the benefit of his former diſtreſs, he ſhall be perhaps without remedy for his Arrerages of Rent. And if the caſe were of a Diſtreſs for Rent behind after the Teſtator's death, I conceive, though not ſo ſtrongly, for moſt of the reaſons above ſaid, that the Law would be all one as in the other Caſe: for though in this Caſe reſpect ſhall not be had to the Executor's

loſs

loſs upon whoſe Goods the Law caſts this Debt, though not the other; yet here the point of loſs muſt fall either upon the Leſſor loſing his Diſtreſs, or upon the other Creditor by Specialty or Record loſing wholly or in part his Debt. And in reſpect of this local tie upon this Land for payment of the Rent, whereto even the Fealty of the Leſſee and Tenure of the Land bindeth him, I think no act that the Leſſee can do by entring into Bonds or Statutes, or having Judgment againſt him, can hinder the Leſſor or Reverſioner from taking his remedy upon this leaſed Land for the Rent therefore due; but rather any other Creditor ſhall be a loſer in his Debt. Doubtleſs, if in bar to the Avowry for this Rent due either before or ſince the Teſtator's death the Executor will plead, that the Teſtator was indebted 1000 *l.* by Statute, Recognizance, or Judgment, which is more than all his Goods amounted unto; it will be no good Plea, but may be demurred upon. What if he plead ſo much Debt of Record to the Crown? Surely I doubt whether this Plea will be allowed in any other Court than in the *Exchequer*: yet if theſe Arrerages of Rent ſhall be levied upon the

Vid. Bro. Pledg. 31.

the Land, ſo as either the Executor muſt pay it, or loſe the Cattel diſtrained by a Return irrepleviſable, and then ſhall not have ſufficient to ſatisfie the Debt to the Crown; I ſee not how he ſhall well eſcape, when purſued in the *Exchequer* to make up this Crown-debt out of his own Purſe, which is hard. For this we may pitch upon as a Maxim and Principle, That an Executor, where no default is in him, ſhall not be bound to pay more for his Teſtator than his Goods amount unto. Again, it is a rule, that where nothing is to be had, *viz.* juſtly to be had, the King loſeth his right: and our Books tell us, the King's Prerogative muſt not do wrong. *Poteſtas ejus juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed Diaboli.* On the other ſide, it may be ſaid, that if Land leaſed come to the King by Grant, Outlawry, or Otherwiſe, the Rent reſerved cannot be diſtrained for; and therefore it is not very unreaſonable nor incongruent that the King's intereſt for his Debt ſhould make the Diſtreſs of a Subject ſtand by and give place. This therefore among other of the Premiſſes do I leave as a *Quære*: nor is it altogether unprofitable

So *Bracton.*

fitable either for an Executor or Creditor to know what ways and paſſages, what caſes and contingents be doubtful and hazardous. And if in theſe unbeaten paths, where our Books and Relations have held me forth no light expreſs or particular, I have erred in miſ-reſolving, or miſſing to reſolve; I hope I ſhall without difficulty obtain pardon.

Now let us conſider of Aſſumptions or Promiſes made by the Teſtator upon good conſideration; the performance whereof, or making recompence and ſatisfaction for not performing, doth lie upon an Executor, as before is ſhewed. Theſe therefore are to come behind, and give place unto all the former; ſo as an Executor this way or for theſe ſued may plead Debts by Specialty, Rent, *&c.* amounting to the whole Goods. And yet theſe Debts by Contract or Aſſumption expreſs are to be ſatisfied before Legacies be to be had. Firſt, becauſe by the Common Law of the Land thoſe are recoverable, and ſo are not Legacies. Next, becauſe, as our Books ſpeak, it concerns the Soul of the Teſtator to have *æs alienum*, all Duties and Debts to other Men, ſatisfied before the Debtor's voluntary Gifts or Bequeſts.

Co. *lib.* 9. *f.* 88. b. Doct. & Stud. *lib.* 2 *cap.* 10 & 11.

queſts. Alſo theſe Debts by Aſſumprion or ſimple Contract are to be ſatisfied before the reaſonable part of the Wife or Children, to which by Cuſtom in ſome Counties they are intitled. See 21 *Ed.* 4. 21. and 2 *Ed.*4.13. and 2 *Hen.*6.16. And note that in ſuch an Action upon the Caſe, it is not of neceſſity to lay or ſet forth in the Declaration that the Defendant hath *Aſſets* to pay all Debts by Specialty, and this alſo; but if there want, the Defendant muſt alledge that in his excuſe, for elſe it ſhall be preſumed that he hath *Aſſets*. So alſo in an Action upon a Caſe grounded upon the Executor's own Aſſumption to pay his Teſtator's Debt: and yet, as the L. *Coke* conceives, and upon good reaſon, as to me it ſeems, if the Executor ſo promiſing had not *Aſſets* ſufficient in his hands to pay this Debt promiſed, he pleading *Non Aſſumpſit*, may give that in evidence; for then the conſideration faileth, as alſo if there were no ſuch Debt due, ſince the Plaintiff could not have recovered if he had ſued, and ſo his forbearance to ſue was no valuable conſideration.

Co. l. 9. fol. 90. b. *Pinchon's* Caſe; and *fol.* 94. *Dane's* Caſe.

CHAP.

CHAP. XIII.

Of Devaſtation or Waſting.

THat which St. *Paul* of Diſpenſers Spiritual (who are as it were the Executors of the laſt Will and Teſtament of our Saviour *Chriſt*) doth ſay or enjoyn, *viz.* that they muſt be *found faithful*; the ſame is required of theſe leſs or inferiour Diſpenſers, the Executors of Mens Wills: and hereof they are to be regardful, not only in reſpect of eſcaping damage to their own Eſtates, but more eſpecially in reſpect of an Oath which divers of our Books mention to be taken by Executors. And in one of the Books of relations of Caſes in the twentieth year of *H.* 7. his time, there is an expreſſion of three things whereto the Office of an Executor tieth him. 1. To do truly, and thereto are they ſworn, ſaith this Book. 2. To be diligent, *viz.* with ſedulity to attend the diſcharge of the truſt. 3. To do lawfully; nor well can this later be without knowledge what is lawful

or required by the Law. Now what is formerly ſaid of the right Method and Order of payment of Debts, diſcovereth in much part how and by what ways an Executor may waſte and miſ-ſpend his Teſtator's Goods, and conſequently incur a Devaſtation, and ſo make his own Goods liable. But of that more fully and particularly by it ſelf. And herein we will conſider of theſe parts.

1. What ſhall be ſaid to be a Waſting or Devaſting, and how many ways that may be done.

2. Who ſhall by this Act be charged to yield recompence.

3. Who ſhall take the benefit or advantage of it.

4. How far or in what meaſure the advantage ſhall be taken.

5. What way or by what means it ſhall be had.

As to the firſt, this Waſting is done divers ways. 1. by the Executor his plain, palpable and direct giving, ſelling, ſpending or conſuming the Teſtator's Goods after his own will, leaving Debts unpay'd. 2. By paying what is not to be pay'd; which yet is to be underſtood where there are Debts payable, and unpay'd.

pay'd. 3. By the way formerly diſcourſed of, *viz.* the not obſerving the right method and order of payment. 4. By aſſenting to a Legatee's having a thing bequeathed, Debts being unpay'd. 5. By ſelling Goods of the Teſtators at an undervalue; for (be the Appraiſement what it will, and let him ſell for what he will) he muſt ſtand charged to the beſt and utmoſt value towards the Creditors. Yet if upon a Judgment againſt the Teſtator or the Executor the Sheriff ſell ſome of the Teſtator's Goods at an under-value, this is no Vaſtation of the Executor, for this difference *Hody* chief Baron makes. But ſince an Executor may haply prevent this Act of the Sheriff, by paying the due Sum upon ſale of the Teſtator's Goods at the beſt value or otherwiſe, he is to be blamed to leave it to the Conſcience of the Sheriff or Under-Sheriff rather. 6. And laſtly, this may be done to the Executor's ſmart by undue, *viz.* not legal, diſcharging of any Debt or Duty pertaining to the Teſtator, and that divers ways requiring heedfulneſs. As if an Executor upon a Bond of two hundred pounds forfeited for payment of 100 *l.* accept the Principal, or perhaps alſo ſome Uſe, Coſts, or Damage,

and give a Releaſe or Accquittal of the whole forfeited Bond, or of all Actions, or upon Record acknowledge Satisfaction upon Judgment had; this is a Waſting of ſo much as the penal ſum is more than is received, and ſo far his own Goods ſtand liable to Creditors not ſatisfied: and ſo doubtleſs is it, if he do but give up the Bond, having no Judgment upon it, though he neither make Releaſe, nor acknowledge Satisfaction. But his verbal Agreement to require or ſue for no more, or his giving a Note of receipt for ſo much as he hath received, or delivering of the Bond into a Friends hands or into a Court of Equity in way of Security to the Debtor, that he ſhall not be ſued for more, is no Devaſtation, ſince ſtill the reſt in Law remains due and ſuable. So this ſets no more upon the Executor's ſcore than he received. But let him take heed of Releaſing, except he be ſure there be no other Debts demandable. Nor only is there danger in Releaſing of Debts, but of Treſpaſſes or other cauſes of Action alſo. As if one take away Goods from the Teſtator, or from his Executor; if the Executor make him a Releaſe, this is a Devaſtation, and makes his own Goods liable to the

13 E. 3. Fitz 91.

Yet on the other ſide, if an Executor by payment of a 100 *l.* get in a forfeited Bond of 200 *l.* it ſhall be an Adminiſt. but of 110 *l* 27 H 8. 6. P. Fitz. *Inſt.*

the whole value of the Goods releaſed: as appears by *Ruſſel*'s Caſe, where the Releaſe of an Infant, Executor to one who had taken and committed to his uſe Jewels and Goods of the Teſtator, being pleaded, the Releaſe was therefore held void in reſpect of Nonage; for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made the Executor's own Goods liable; which, his Infancy conſidered, had been hard. Another way of diſcharging dangerous to Executors is, ſubmitting matters of Debt or Duty, or touching Goods taken away, to Arbitrement. For if by the award of the Arbitrators the Debtors or Wrong-doers be diſcharged or Acquitted without making full recompence, the reſt of the value will (as to other Creditors) lie upon the Executor's skirts, becauſe it was their voluntary act thus to ſubmit it to Arbitrators. Thus may Executors fall under prejudice, not only by wilful Waſting or unfaithful miſcarriage, (wherein they are not to be pitied) but through incogitancy and unskilfulneſs alſo. Nay, I may ſay truly, that it is very hard for Executors in ſome caſes to walk ſafely: for beſides that, to find out all Judgments and Recognizances by or againſt

their Teſtators is of ſome difficulty more than for Statutes, whereof by ſearch in an Office deſcry may be had; yet with this difference, that Statutes-Merchant and Statutes-Staple may be and ſtand effectual againſt Executors, though not inrolled; albeit againſt Purchaſers of the Conuſors Land they be not of force, if neglect be of Inrolment within three months. But where Statutes or Recognizances lie for performance of Covenants upon Sale or Leaſe of Lands, Marriage, Agreements, or otherwiſe; how hard is it for Executors to know whether any Covenant be broken or not? How hard to be ſure they find out all Bonds, Bills, Covenants and Articles in writing, made and kept by others, whereby any Mony is due and payable before Debts by Contract or Legacies, as alſo all Promiſes or Debts by Contract payable before Legacies? For the Law hath preſcribed no time for their claim and demand: and whether ſome ſuch thing or mean of publication were not fit to be enacted, let the judicious conſider. To attain to this knowledge of the Teſtator's Debts, I remember that it is by the Lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being Executor

cutor to Sir *William Spencer*, made Proclamation in certain Market-Towns, that the Creditors ſhould come by a certain day, and claim and prove their Debts; but he for this was committed to the *Fleet*, and fined. For that none may make Proclamation, ſaith the Book, without Warrant or Authority from the King, except Mayors and ſuch like Governours of Towns, who by Priviledge or Cuſtom may ſo do. But the dangers are only where there is not ſufficient of the Teſtator's Goods and Chattels to ſatisfie both Debts and Legacies. For where there is ſo, the Executor is not in any ſuch hazard as aforeſaid. This diſcry of Danger may breed Caution; and *Qui timent cavent, & vitant.*

As to the ſecond, we ſhall have in conſideration two ſorts of perſons, *videlicet*, 1. his Executors, there being many times divers Executors, and the Waſte or Devaſtation done but by one; 2. the Executor's own Heirs, Executors and Adminiſtrators, *viz.* whether, he dying, this Act ſhall fix upon them like charge and burthen for ſatisfaction, as upon himſelf ſhould have lien in caſe he had lived.

Touching his Companions though all

Lib. Intrat. fol. 327. Kelw. *Rep. fol.* 23. So 11 H. 6. 38. a. 4 *El.* Dy. 2. 10. a. the Writ ſo iſſued againſt the Waſter only. *P.* 4 H. 8. *Rot.* 303. *Tr.* 34 *Eliz.* *Poſ.* 36 *Eliz.*

together make but one Executor, yet the miſ-doing of one ſhall not charge the reſt, nor make their Goods liable to recompence: as both appears by the Book of *Entries*, and was alſo held in the time of *Henry* the ſeventh, *Anno* 12. of his Reign. Yea of the ſame opinion were the Judges twice in the late Queens time, *viz.* firſt in a Caſe between *Walter* and *Sutton*, in the *Common Pleas*, and ſhortly after in the *Kings Bench*, in a Caſe between *Hankeford* and *Metford*; though theſe two Caſes be not reported in Print. And ſurely this ſtands with Rules of Reaſon or Juſtice, that each ſhould bear his own burthen. If it were otherwiſe, many would decline and abandon Executorſhips, as very dangerous to the moſt honeſt and faithful, in caſe they were ſubject to racking by the miſcarriage of their Collegues.

As for the Executors or Adminiſtrators of the waſting Executor dying before he have born the burthen of his miſ-doing, I have found contrary opinions, even in the late Queens time. For firſt, in the *Exchequer* it was conceived to be as a Treſpaſs dying with the perſon, as coming within the Rule, *Actio perſonalis moritur*

cum

cum perſonâ. But in the ſaid caſe of *Walter* and *Sutton* the Court of *Common Pleas* was of contrary opinion, *viz.* that this was not eſcaped by the death of this Miſdoer, but the Law would purſue his Executors or Adminiſtrators, and lay upon their backs the burthen of Recompence or Satisfaction; for that the Teſtator or Inteſtate doing this wrong had made himſelf to be Debtor in the firſt Teſtator's ſtead, and therefore they who repreſent his perſon muſt with his Goods make amends and ſupply. And this later opinion was ſomething in time after the former. Alſo between theſe two times was there an opinion in the ſaid Court of *Common Pleas* agreeing in part with this later: For there a Judgment being had againſt an Executor, and the Sheriff upon the *Fieri facias* returning that there were no Goods of the Teſtator in the Executor's hands, and then this Executor dying, a *Scire facias* upon a ſuggeſtion of Devaſtation by the ſaid Executor deceaſed was awarded againſt his Executor, and that upon good debate, and ſhew of a Precedent left, and reported by M. *Fennour* in King *Hen.* 8. his time. And it was then ſaid to have been clear, that if a Devaſtation

Mich. 31 & 32 *Eliz.* *Tr.* 34 *Eliz.*

Tr. 34 *El.*

Mich. 32 & 33 *Eliz.*

on

on had been returned in the life-time of the ſaid waſtful Executor, his Executor then ſhould have been charged. All the doubt was, for that here that was not done in his life-time; yet at laſt affirmatively (as above is ſhewed) the Reſolution was.

Touching the third Point, *viz.* To whom the advantage of Waſting ſhall accrue, or who by reaſon thereof ſhall charge this waſting Executor: Put we the caſe the Teſtator ſtood indebted to *A* by Statute, and to *B*, *C* and *D* by Specialty not of Record, as Bond, Bill, *&c.* and the Executor having no more in *Aſſets* than only an hundred pound, and this all being due to *D*, he payeth him the whole hundred pound, not having any thing left to ſatisfie any of the reſt of the Creditors: hereby wrong is done to none but *A*, who was a Creditor by Statute, and therefore he only ſhall make this Executor to pay the like ſum out of his own Goods, ſince as to him only this is a Devaſtation, or that it was at his election to pay off the other Creditors, which he would, no Suit being commenced by any off them, conſequently no wrong was done to *B* nor *C*. And if no

ſuch

ſuch Debt had been by Statute, but all had been Creditors by Specialty, and *A* only had commenced Suit, and that known to the Executor; now if after he payed all to *D*, he ſtands only as to *A* liable in his own Goods, and not to *B* nor *C*. But if the Executor had only paid a Legacy or Debt by Contract, leaving nothing for ſatisfaction of the Debts by Specialty, than had he ſtood equally liable to each of the other Creditors. *Capiat qui capere poteſt*. viz. He who firſt could recover, or by the voluntary act of the Executor could obtain payment, muſt be preferred, if the ſum would reach no farther. For it ſhall by this miſpayment, or miſconverſion, ſtand with the Executor as if he had not payed it nor departed from it at all upon the matter: and therefore I doubt not but it is free for him to give the advantage of this his error to which Creditor by Specialty he will, ſo as he ſhall ſtand free from all the reſt, no ſurpluſage remaining, nor any Creditor of Record being. For if there be any Debt upon Record, the Executor ſued by a Creditor upon Bond may, notwithſtanding this his Waſting, plead in bar of this Suit, that there is ſuch a Record of a Debt not ſatisfied

If upon fully adminiſtred pleaded to one, *vel alter*, he have the advantage of this Vaſtation, taking up the whole Sum w ſted, *Que.* how the Executor ſhall relieve himſelf againſt another.

ſatisfied, and that he hath no more than that Debt amounts unto, and ſo admit ſo much ſtill in his hands as he hath miſ-adminiſtred, though in kind it be not in his hand, but miſ-ſpent, or unduly payed, as aforeſaid. And what is before ſhewed of the Statutes precedency before Bonds, in taking the advantage againſt an Executor for devaſting or waſting, the ſame is to be underſtood of precedency of Judgments before Statutes, and Debts to the King before Judgments, *&c.*

As touching the fourth Point, *viz.* How far the Executor thus waſting ſhall incur damage or make his own Goods liable; Doubtleſs, no farther than the value of the Teſtator's Goods waſted or miſ-adminiſtred. Therefore if one have advantage thereof to the full ſum, no other after ſhall; for he is no farther a Treſpaſſer or Wrong-doer, nor is the Teſtator's Eſtate any farther or deeplier damnified. And as Damages for Treſpaſs are to be proportioned to the value of the Wrong done and loſs ſuſtained; ſo alſo in this caſe the Executor by his miſdoing doth not draw upon himſelf his Teſtator's whole Debts, but ſo much only as the Goods amounted to which he did miſ-

miſ-adminiſter, and which ſhould have gone to the payment of the Teſtator's Debt, if he had not ſo miſguided himſelf in the office of Executorſhip; which default he muſt repair or make good. And this proportion ſeems to me proved by the Caſe in K. *Edw.* 3. where the value or quantity is found, eſpecially of the Goods adminiſtred wrongfully, though there by a wrongful perſon: and in *Sutton*'s Caſe it was expreſly held, that each Executor ſhould anſwer for ſo much as he waſted. 41 E. 3. 31.

Now for the fifth and laſt Point, *viz.* How and in what manner Relief ſhall be had upon this point of Waſting, for him to whom it pertains: Firſt, this is to be obſerved, That in caſe where the Verdict paſſeth directly againſt the Plaintiff, no Devaſtation can come in queſtion, for that no Judgment being for the Plaintiff, no Writ of Execution can iſſue; and therefore, if upon the iſſue of fully adminiſtred it ſhall appear that there hath been a Devaſtation, which cauſeth *Aſſets* to fail, then muſt the Jury find that the Defendant hath *Aſſets*, and not find a Devaſtation, as was reſolved in the *Kings Bench* in the late Queens time between *Hankeford* and *Metford*: for there the Jury finding *Paſ.* 36 El. in 6. Reg.

ing a Devaſtation, *viz.* a Surrender of a Leaſe for years left by the Teſtator, it was held void and nugatory, and was not regarded by the Court, which ſaid that muſt come in by the Sheriffs Return, *viz.* upon the *Fieri facias.* Thus *Aſſets* being found in the Executor's hands, Judgment is given for the Plaintiff to recover his Debt, and to have it levied of theſe *Aſſets*: nor is this finding of them by a Jury againſt truth, though they be waſted, and ſo not to be had in kind; for the Executor hath them in right, ſince he hath not rightfully parted from them; according to the Rule, *Pro poſſeſſore habetur qui dolo* (or *injuria*) *deſiit poſſidere.* As in the Caſe firſt put, this Waſting cannot come in queſtion for want of a Judgment for the Plaintiff; ſo alſo where the Judgment it ſelf extendeth to the Executor's own Goods by reaſon of ſome falſe Plea, whereof we ſhall after conſider: for ſince that the conſequence and effect of a Vaſtation is but to make the Executor's own proper Goods liable to the Debt of the Creditor, this is altogether needleſs where the Judgment it ſelf hath laid hold on his Goods. But now in caſe where the Judgment extends only to the Teſtator's Goods

Goods in the Executor's hands, let us find the way to relieve the Creditor, in caſe the Teſtator's Goods be waſted by miſ-adminiſtring or otherwiſe; for hereabout the right way hath often been miſſed, and again eaſily may be. In the later end of the late Qu. time, this courſe was taken, *viz.* The Sheriff returning generally, that the Executor had no Goods, a Surmiſe was entred, that the Executor had converted to his own uſe the Teſtator's Goods, whereupon a Writ was awarded to the Sheriff to enquire thereof by Jury or Enqueſt, which he did, and returned, that it was found that the Executor had waſted the Goods; and thereupon a *Scire facias* was awarded againſt the Executor, to ſhew cauſe why Execution ſhould not be of his own Goods; and upon two *Nihils* returned, Execution was ſo awarded: but a Writ of Error was hereupon brought. And although it were ſaid, for defence of that courſe, that it was uſual in the *Common Pleas*, and more favourable than the other courſe, where the Sheriff only returneth the Waſting, or is ſole Judge thereof, whereas here it was found by an Inqueſt of Jurors, and thereupon a *Scire facias* awarded; yet did the Court reſolve

45 *El.* Pettifers Caſe. 5 Co. *l.* 5. *f.* 32.

reſolve the contrary, and reverſe this Execution as erroneous: for it was ſaid, that upon the Sheriffs return of *Nulla bona*, *viz.* that there were no Goods of the Teſtator to be found, the Plaintiff ſhould have a ſpecial Writ of *Fieri facias*, willing the Sheriff to levy the ſum recovered either of the Goods of the Teſtator, or if it could appear that the Executor had waſted the Teſtator's, then to levy it of his own Goods. And this way, as was ſaid, the Executor hath good remedy by Action againſt the Sheriff, if without juſt cauſe he levy it of his Goods; but the other way, *viz.* when Inqueſt is thereupon taken, the remedy fails, ſince neither the Sheriff doing according to the Inqueſt can be puniſhed, nor the Jurors finding falſly are ſubject to any Attaint, it being no Verdict upon Iſſue joyned, but an Inqueſt of Office, which excludeth alſo all challenge of Jurors. And whereas that Book mentions the Sheriffs ſubjection to Action only in caſe of his miſ-feaſance or doing wrong; I conceive that he is likewiſe ſuable for omiſſion or non-feaſance in this caſe, *viz.* for not levying the Debt upon the Executor's own Goods, where proof is made

So 9 H. 6. f. 9.

See *Paſton*, 11 H. 8. 16. 36. upon ſurmiſe that *A* hath waſted, a *Fieri facias* may iſſue againſt his Goods only, if ſo, &c.

So *lib. Intr. fol.* 11.

of

of his Waſting. And where the Book mentions this *Fieri facias* to be in this manner upon the Sheriffs return in a *Scire facias*, boubtleſs the Book therein is miſprinted, and ſhould be a *Fieri facias*; for in a *Scire facias* the Sheriff can return nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the courſe there preſcribed, that firſt a general *Fieri facias* go out, and that thereupon the Sheriff return generally, that the Defendant hath no Goods of the Teſtator's, and that thereupon the ſaid ſpecial Writ is to iſſue. Yet in the beginning of the late Queen's time, the Verdict paſſing for the Plaintiff upon the Iſſue of fully adminiſtred, the Sheriff was not permitted to make ſuch a general Return of no Goods to be found of the Teſtator's, but was enforced by the Court upon good adviſement either to levy the Debt, or to return a *Devaſtavit*: and ſo it was done at laſt by the Sheriffs of *London*, much againſt their minds; and thereupon went out a Writ to levy the Debt of the Executor's own Goods, firſt in *London*, and after in *Devonſhire*, upon a *Teſtatum* that the Executor had Goods there. And it was there ſaid, that

2 *El.* D. 185. Woodw. and Chicheſters Caſe.

if no Goods could be there found, then the Plaintiff might have a *Capias* to take the Executor's Body in Execution, or an *Elegit* for the Moyety of his Lands. But certainly I cannot find (except with a difference) how this courſe of enforcing the Sheriff to do one of theſe two can be juſt; as neither could Juſtice *Fulthorp* in the time of K. *Henry* the ſixth approve it. For a Jury of one County may find *Aſſets* in another County, as was reſolved in the time of K. *Henry* the 8th, which yet was underſtood of Goods moveable, and not of Lands. This then thus being, if a Jury of *Kent* find *Aſſets* which be in *London* or *Eſſex*, how can the Sheriff of *Kent*, where the Action was laid, levy the Debt recovered by or out of theſe Goods? or, ſince he cannot, why ſhould he be compelled to make a falſe Return of a Waſting, when the Goods remain unſpent and unwaſted in another County? Why rather ſhould he not be ſuffered to return according to truth, that there is nothing within his County or Bailiwick whereof the Debt may be levied, ſince even his Oath tieth him to make a true Return? Nor is this contrary to the Verdict, finding *Aſſets* generally; and

11 H.6.f.28. 28H.8.Dy.3 Yea Co.li. 6. f.47, 48. Aſſets in *Ireland* or elſewhere beyond the Sea, may be found by the Jury where the Action is laid.

For the Pl. may, if he will ſuggeſt the being of *Aſſets* in a foreign County, and this is uſually done. See *Trb. intr.* 11.a. Action upon the Caſe for a falſe Return of Devaſtat. *contra ſacr. ſui debitum*, 28 *H.* 8.

and this ſo returned upon a *Teſtatum*, the Proceſs may be directed into the right County. But in the ſaid Caſe it was replied to the Plea of fully adminiſtred, that there were *Aſſets* in *Eſſex*, the Action being laid in *Middleſex*, and yet, as it ſeems by the Book, the Trial was to be by a Jury of *Middleſex*, which, ſaith the Book, may find the *Aſſets* in *Eſſex*: but there the Plea was demurred upon, and held a good Plea; which proves, that although the tranſitorineſs of the *Aſſets* makes them ſubject to the notice of a Foreign Jury, yet is it not like an act tranſitory, and not local, for that muſt be pleaded to be done in the place where the Action is laid, though in truth not ſo. But had Iſſue been joyned upon the point, methinks it ſhould be tried in *Eſſex*, where the *Aſſets* be laid; the rather for that perhaps they may be real Chattels, *viz.* Lands leaſed to the Teſtator, or other Lands of him appointed to be ſold for payment of Debts, which, as heretofore hath been held, a Jury of another County cannot find. Beſides, although ſuch a Foreign Jury may find other moveable *Aſſets*, yet is it at their election, they are not thereto compellable, as elſewhere is holden. Here then

2 *Ma.* Brd. *Attaint* 104 & 10 *El.* Dyer 271. Becauſe local & fixed, otherwiſe held, 3 *Jac. in Com. Ban.* Co. *lib.* 6. *f.* 46, 47. 22 *E.* 4. 9. & 2 *Ma.* Bro. *Att.* 104 18 *H.* 7. Kelw. *Rep.* 51. a. So held *P.* 31 *E. in Scaccar.*

may be the difference, *viz.* That if the *Aſſets* be found to be in the County where the Trial is, there the Sheriff of that County cannot return *Nulla bona*, without adding that the Executor had waſted: but if there be no Verdict at all touching *Aſſets*, Judgment paſſing againſt the Executor upon a Demurrer, Confeſſion, *Nihil dicit*, or the like; there may the Sheriff make ſuch a Return of *Nulla bona Teſtatoris*, without returning any Devaſtation: and ſo alſo where the Verdict either findeth *Aſſets* generally, not finding in what place they be; or expreſly findeth them to be in another County, as a little before we found may be done by a Jury of *London* of *Aſſets* in *Eſſex*.

So if the Proceſs for Execution go into another County than where the Verdict found as the difference was held in *Scac.* 31 *El.* 28 *H.* 8. Dy. 30. b. *Paſ.* 4 *H.* 8. *Rot.* 303. 4 *El.* Dyer 210.

But 3 H. 6. 12 without any *Sci. fa.* upon the Devaſt. returned, a *Capias* was awarded by the Court; and ſee 9 *H.* 57. Bro. *Ex.* 57. & *Lib. intr.* 320.

A *Fieri fac.* abſolutely and without condition.

In King *Henry* the Eighth his time, as a little after the ſaid *Chicheſter* is by the Lord *Dyer* reported, the Sheriff returning upon the *Fieri facias*, that the Executors had no Goods of the Teſtator's, did add in the ſame return, that one of the two Executors had waſted, and thereupon a *Sci. fac.* was awarded againſt him; and upon *Sci. feci* returned, and Default made, Execution was adjudged, and awarded againſt his Goods only. And this courſe of *Sci. fac.* both the L. *Dy.* (as elſewhere I find it reported)

ported) and *Priſot. temp. H.6.* approved. But I am perplexed with doubt what Plea the Executor coming in upon the *Scire facias* could plead; for except his denial of Waſting might be pleaded contrary to the Sheriffs Return, and put in Iſſue, ſo as to cauſe a new Trial after a former, perhaps preceeding Judgment, which I think would not be admitted, then his coming in is to little purpoſe, for ought I can conceive. Here again it muſt be obſerved, that in the Caſe of *Chicheſter*, the Judgment was had upon Trial of fully adminiſtred: but in the other Caſe in the time of King *Henry* the Eighth it was upon Confeſſion; which is all one, as I take it, with Condemnation upon Demurrer, or *Non ſum informatus*, or Trial upon *Non eſt factum*, to the Bond, or a Releaſe to the Teſtator or the like. Now between all theſe and that of *Chicheſter* there is a broad difference: for there the Defendant being convinced by Verdict to have *Aſſets*, which if they continue not in his hands in kind, muſt be anſwered out of his own Goods as waſted, therefore the *Fieri fac.* to levy the Debt of the Teſtator's Goods if any found, or in default thereof out of his own Goods, is very agreeable and purſu-

So 9 *H.* 6. 49, 50. A manuſcript report. 36 *H.* 6. 3. and *Mordant*, 12 H. 7. Kel. *Rep.* 24. But *Vavaſor* Juſt. and all the other Serjeants *é contra.* 2 *El.* D. 185.

ant; but in none of the other Caſes is there any ſuch Trial or conviction of the Defendant's having *Aſſets*, ſo as it reſts *æque dubium* whether they have *Aſſets* or not; and therefore it may ſeem ſomewhat hard and harſh to ſend out ſuch a Writ in that Caſe; and ſo ſhould I have thought, if I had only ſeen the Report of *Pettifer*'s Caſe. But looking into the Record, and finding the Condemnation there to be by *Nihil dicit* in effect, I cannot uphold any diſtinction of courſe in reſpect of the ſaid difference of Caſes. Nor indeed doth that courſe there directed preſume that the Executor either hath *Aſſets*, or hath waſted them, but commands that if *Aſſets*, &c. then the levying ſhall be one way; if Waſting, then another way: ſo if neither, *Nihil fiend.*

Co. l. 5. f. 31. *Mich.* 41 *El. Rot.* 2. 4. Co. *lib. intr.* 266. b. A recovery of Debt precedent was pleaded: Pl. replied *Nul tiel record*, and Defend. would not maintain his Plea. *Ideo condemp.* If neither, he muſt ſo return, and do nothing.

CHAP. XIV.

Of an Executor of his own wrong.

TO begin with ſome definition or deſcription of this Man; He is ſuch as takes upon him the Office of an Executor by intruſion, not being ſo conſtituted by the Teſtator or deceaſed, nor for want

want of ſuch Conſtitution ſubſtituted by the Ordinary to adminiſter. Touching whom we will conſider in theſe parts, and with this method, *viz.*

1. What acts or intermedlings of ſuch an one, not being Executor nor Adminiſtrator by right, ſhall make him to become an Executor by wrong. *Vide* five more, *per Stat.* 43 *El. cap.* 8.

2. In what manner and by what name ſuch ſhall be ſued, eſpecially when another than he is Executor or Adminiſtrator, or himſelf after ſuch act becomes Adminiſtrator.

3. How far he becomes liable to Creditors, and how, and to whom.

4. What acts done by him ſhall ſtand firm as if he had been an Executor by right.

5. See a late Stat. 43 *El. cap.* 8. hereabout. 1 *Point.*

As to the firſt, it was in the time of Queen *Mary* doubted, and not reſolved, whether the only ſeiſing and taking into one's hands the Goods of the deceaſed did make one Executor of his own wrong, without any farther act. And in the beginning of the late Queen's time the L. *Dyer* ſaid, that the poſſeſſion and occupation of, or medling with the Goods is that which gives notice to Creditors

1 & 2 P. & M. Dy. 103. b

1 El. Dyer 166 & 167. So alſo Bulkn. 50 Ed. 3. 9.

ditors whom they are to ſue as Executor. But doubtleſs Creditors muſt look farther before Suit; for elſe can they not know whether he ſo intermedling be Executor or Adminiſtrator; nor conſequently how to found their Suit rightly and ſafely for good ſucceſs; ſince a Suit againſt an Executor as Adminiſtrator, or againſt an Adminiſtrator as Executor, will prove ruinous, and fall to the ground. Yea where an Adminiſtrator ſued as Executor did not plead that Adminiſtration was committed unto him, but generally denied that he was Executor, or adminiſtred as Executor; the Lord *Dyer* held that it muſt be found for him, yet left it doubtful; but the clear and ſafe way had been to have pleaded the Adminiſtration, *&c.* And in the former Caſe the Lord *Dyer* ſaid, that one intermedling only about the Funeral, and laying out Mony, therefore an Overſeer or Conductor, or he who hath Letters of the Ordinary *ad colligend. viz.* to get and keep the Goods in ſafety, and he who intermedleth by virtue of a Will truly made, but controlled by a later Will after found and proved, may free himſelf from being an Executor of his own wrong, by ſpecial plead-

13 & 14 El. Dy. 305, 306

1 El. Dy. 166 & 167 See l. intr. 322 b.

pleading how or in what right he intermedled, and traverſing his Adminiſtring in other manner: and that this Traverſe need not, nay may not be, was held in the time of King *Henry* 6 and 7 for that ſuch acts amount not to any Adminiſtring at all; and where no Adminiſtring at all is confeſſed, ſuch a Traverſe of not Adminiſtring in other manner is diſſonant, and not legal. But let us look back upon theſe ſeveral points exempted by the Lord *Dyer*, and we ſhall ſee ſome cautions neceſſary touching them and their ſafe entertainment. Firſt, as touching the point of Burying the Dead, it muſt be underſtood to be with ſome expence of the deceaſed's Goods, and ſo it is expreſſed in the ſaid Book of *Hen.* the 6 his time: elſe for a Man out of Charity to lay out of his own Mony (not intermedling with the Goods of the deceaſed) to bury a Friend, hath little colour to involve him ſo doing in an Executorſhip by wrong. Taking the Caſe then, that ſuch perſon lays out or expends of the deceaſed's Goods or Mony upon his Funeral, heed muſt be taken touching the meaſure and proportion whereabout. Though I can give no particular and diſtinct limit, yet doubtleſs

12 *H.*6. 28. 10 *H.*7. 28. Yet *Lib. intrat.* 321.b. where he confeſſed about Funeral, he traverſed *aliter Lib.intrat.* 321. where by Letter *ad collig.* he traverſed, *Abſq; hoc quod & Ex.*

21 *H.*6. 21.

leſs either mere neceſſity, *viz.* Church-duties, *&c.* or at leaſt decent Sutableneſs to his quality muſt be the bounds. And herein to ſpeak as I think, this later muſt either be utterly excluded, or held within very narrow compaſs: for what reaſon that a Kinght or Man of higher Quality, leaving (though perhaps entailed Lands of good value) yet Goods not ſufficient to pay his Debts, ſhould have an hundred pounds or more of that which ſhould ſatisfie Creditors, ſpent in pompous interring of him for his Worſhip and reputation? Next, Overſeers may only be excuſed for ſeeking to preſerve and keep the Teſtator's Goods, not in caſe they expend or diſpoſe thereof. So alſo for him who is authorized by the Ordinary to collect, for if he ſell or diſpoſe of any (though Goods otherwiſe ſubject to periſhing) it makes him an Executor by wrong, as was reſolved in the late Queen's time, notwithſtanding that by the Ordinary's Letters he was expreſly directed or warranted ſo to do; for it was ſaid, the Ordinary himſelf could not ſo do. As for him who adminiſtred by virtue of a Will after diſproved, or controlled by a Letter, he muſt

Lib. Int. 322. 8 & 9 *Eli.* Dyer 255, 256. He ſold blended Corn, but pleaded not the ſpecial matter.

muſt not doubtleſs ſtand free for the Goods before adminiſtred, but either as rightful or wrongful Executor ſtand liable to the Creditors. Nor doth every ſuch intermedling by one out of all theſe excuſes and evaſions as would be an Adminiſtration, make one an Executor by wrong. If one do but take an Horſe of the deceaſed, and tie him in his Houſe or Stable, this makes him not an Executor, ſaith *Paſton* Juſtice, or like acts or intermedlings; as he that delivers to the Wife of the deceaſed her Apparel, at leaſt if it be no more than is convenient to her degree. But if ſhe take, or another deliver, more than ſuch to her, ſhe or he becomes an Executor by wrong. But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or Adminiſtration committed; for there ſuch light acts or intermedlings ſhall not make one an Executor by wrong, as where there is no other of right to be ſued. As if one take Goods wrongfully from ſuch a right Executor or Adminiſtrator, this (though he convert them to his own uſe) makes him not an Executor by wrong, but a Treſpaſſer to the right-

1 & 2 P. & M. Dy. 185.

21 H. 6. 28.

33 H. 6. 32. 1 Eliz. Dy. 166. *Tr.* 37 *Eliz.* by *Fenner.* Juſt. If one do any ſuch act as pulls the Property out of the Executor, he is become an Executor by wrong.

If the goods be aliened by fraud, he who takes them after the Executors death is an Executor by wrong.

rightful Executor or Adminiſtrator, who even for theſe Goods, once *Aſſets* in his hands, ſtands liable to Suits of Creditors, they being neither lawfully evicted nor rightly adminiſtred: but in caſe there had been no Executor at that time, or no Will proved, nor Adminiſtration committed, then ſuch taking of the deceaſed's Goods into a ſtrange hand had made an Executorſhip by wrong. And thus was the difference lately reſolved, as is reported by the L. *Coke* in the Caſe between *Read* and *Carter* in the *Common Pleas.*

Tr. 37 *Eliz.* D. 5 *E.* 4. 72. a.

Tr. 2 *Jac.* *in com. b.* Co. *lib.* 5. 53 & 54

Yet this farther difference was there held, *viz.* That although there be an Executor or Adminiſtrator by right, yet if a Stranger take upon him to receive Debts and make Acquittances, or to pay Debts, claiming to be an Executor, he is ſuable as an Executor by this Act: and ſo alſo in the late Q. time was held by 6 Juſt. as touching the receipt of Debts and making Acquittances; but the Book mentions not whether any other Executor then were, or not. But in the point of bare payment of Debts, *Frowick* makes another difference, *viz.* If a Stranger do with his own Mony pay the Debts of a Friend deceaſed, and not with the Debtors; this is but

1 *Eliz.* D. 160. b.

7 H. 5. 20.

but an act of Charity, and makes him not an Executor by wrong: otherwiſe, if with the Debtor's Mony. Yet to this another difference muſt be added, *viz.* That if he thus paying with his own Mony, have taken into his own hands Goods of the deceaſed; then is his payment preſumed as by or out of the value of theſe Goods, and ſo makes him an Executor by wrong. Contrarily, if he have no ſuch Goods in his hands. And in the point of intermedling with and diſpoſing of the Teſtator's Goods, where another Executor is, this farther difference is to be added or underſtood, *viz.* That where the Goods ſo taken never came actually to the Executor's hands, but were in a remote place, there this taker becomes Executor. For as it were miſchievous to the Executor, if he ſhould by a poſſeſſion in Law caſt upon him, ſtand chargeable with theſe Goods in remote places purloyned, as *Aſſets* in his hands; ſo were it as miſchievous to Creditors, if neither Executor by right, nor this Stranger as an Executor by wrong, ſhould ſtand liable to Creditors for them. It is true, that the right Executor may ſue and recover Damages for them, and that ſo recovered ſhall be

Aſſets;

Aſſets; but the Creditor hath no mean at the Common Law to enforce him to ſue, and perhaps it may be a cold Suit. And with theſe Additions I think that late reſolved difference may ſtand firm and ſound. Yet in former times, without ſuch difference, the taking only and poſſeſſion of the Goods of the deceaſed was held to create an Executorſhip by wrong,
50 E.3 *fo.*9. as *Belknap* ſaid in the time of King *Edw.* the third; and eſpecially if the Act were ſuch as removed the Property of the right
Tr. 3 *Eliz.* Executor, as Juſtice *Fenner* in the late Queen's time ſaid, *teſte meipſo.*

How and by what name Suit ſhall be againſt ſuch, and the like.

2 *Point.* TOuching the ſecond Point, *viz.* In what manner Suit ſhall be againſt
*L.*5 E.4.72. *Co.lib.*5.30, 31 & 32.*b.* 21 H 6.8. ſuch: Firſt, in general, this uſurping Executor is not in Suit to be diſtinguiſhed by name from the right Executor, but to be ſued generally by the name of Executor of the laſt Will and Teſtament of the Defunct; and then if he will deny himſelf ſo to be, he muſt plead that he neither is Executor, nor hath adminiſtred as Executor. Then the Plaintiff muſt

muſt prove that he hath adminiſtred in ſome ſuch or the like ſort as aforeſaid. And it hath been divers times held, that where there is a right Executor, and yet another doth adminiſter by wrong, it is at the election of Creditors either to ſue them joyntly together, or one or both of them ſeverally and by himſelf. But if where Adminiſtration is committed, another alſo adminiſters by wrong, theſe cannot be ſued together as Adminſtrators; for though one may be an Executor by uſurpation or wrong, yet none can come to be an Adminiſtrator by wrong, ſince no other but ſuch as receiveth that power from the Ordinary can ſo be: therefore in that caſe there is a neceſſity of ſuing him apart and by himſelf (who ſo uſurpeth Adminiſtration) by the name of an Executor.

Co. *lib. intra* 154. But 145. *a.* in the Verdict he is called Exec *de injuria ſua propria.* 39 H. 6. 45, 46. 21 H. 8. 8, 19. 9 *E.* 4. 14, 15. 1 *&* 2 *P. & M.* Dy. 165. 33 H. 6. 38.

25 H. 6. 31.

So if *A* adminiſter the Goods of *B*, not being Executor nor Adminiſtrator, and after his ſuch doing and diſpoſing of the Goods, he obtaineth Adminiſtration of the Goods of *B*, but the Goods left or coming to his hands ſince the Adminiſtration committed ſuffice not without the other Debts received or releaſed, or Goods ſold before, to ſatisfie Creditors: now if

R. 3. 20.

if any ſue *A* by the name of Adminiſtrator, he ſhall have no farther Relief than according to the value or extent of the Goods left in or come into his hands ſince the Adminiſtration committed; and if thoſe be fully adminiſtred, he ſhall get nothing; if they remain unadminiſtred, but amount not fully to his Debt, he muſt want ſo much of ſatisfaction; and if he will be relieved, or ſatisfied out of the Goods before diſpoſed of, he muſt ſue *A* as Executor of *B.* And ſo was it ruled and reſolved by *Gawdy* and *Shuit*, Juſtices in the *Kings Bench*, in the late Queen's time, *viz. Tr.* 30 *Eliz.* And if this now Adminiſtrator will plead in Abatement of this Action that Adminiſtration was committed to him, and demand Judgment, if Suit ſhall be againſt him as Executor, then the Plaintiff muſt in the Replication, as I take it, ſet forth the ſpecial matter, *viz.* how the Defendant did adminiſter before Adminiſtration to him committed. But if one to whom Adminiſtration is committed do devaſt, and this Adminiſtration is by Suit repealed, becauſe he was not the next of Kin, and Adminiſtration is committed to another; now a Creditor who would be relieved out of the

21 *H.* 6. 8. If the Adminiſtration were committed before the Suit began, the Writ ſhall abate, elſe not, as was of old conceived.

the Goods wasted, must sue that first as Administrator, and not as Executor of his own wrong, said *Popham* Chief Justice, for he did rightfully administer for that time. *Vid.* 8. 185.

AS for the third, *viz.* How far this Executor of his own wrong becomes liable and obnoxious to Suit; consider we these things. 3 *Point.* How far liable to Creditors.

First, he becomes subject both to the Action of the Executor, who hath right to the Goods wrongfully intermedled withal by him, though it were before proving of the Will; and also to the Action of the Creditor, who hath right to the Satisfaction of his Debt.

Secondly, as touching the measure how far he is engaged, doubtless he is not by his wrongful Administring become chargeable with the whole account of the Testator's Debts; but only so far, and with so much thereof, as the Goods which he so wrongfully administred amount unto. (Yet he must look to his Plea, else by it he may draw all sued for upon himself; as if he deny his being Executor or Administrator.) And this seems to me proved by the Case in the time of *Edward* the third, where the Inquest found Co. *Litt.* 144, 145. *Plut de hos.*

not only the Administring or intermedling by the Executor wrongfully, but found also, by direction of the Court, (as it seemeth) what the value was of the Goods so wrongfully administred, which had not been material, if the Administring of a Peny had made one as far chargeable as the Administring of a pound. Besides, if it be so that a rightful Executor wasting Goods of the Testator to the value of 20 l. shall be no farther charged than that value, then doubtless so shall it be also in this case for both the wrongful Administrations; only this difference there is between them, that in one case the Administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord *Dyer* doth not stick to call him who administreth wrongfully, or in undue manner, expresly an Executor by wrong, in the Case of *Stocks* against *Porter*, though he were rightfully Executor, because he did dispose or execute wrongfully.

1 *El.* Dy. 167. *cap.* 12.

4 *Point.* What Acts of his of force.

AS to the fourth point, What acts done to him or by him who is an Executor of his own wrong shall stand firm and good, as done by or to the right Executor;

cutor: Suppoſe, firſt, that the deceaſed were indebted to him 20 *l.* who thus uſurpeth Executorſhip, whether may he pay himſelf or not? And this point was in debate in the *Kings Bench* between *Coulter* and one *Ireland*, Executor of *Hunt*, where it was ſtrongly objected, that notwithſtanding the rightful Executor or Adminiſtrator might puniſh him, and recover againſt him, for the Goods which he adminiſtreth; yet another Creditor ſuing him as Executor generally, and ſo affirming him to be, (for there is no ſpecial form of Writ or Declaration to diſtinguiſh an Executor by wrong from a rightful Executor) he ſtands as againſt him in the ſtate of a rightful Executor, and therefore may firſt pay himſelf before he pay others: and of that mind at the firſt were *Fenner* and *Gaudy* Juſtices; yet did they admit that this payment ſhould not ſtand good as againſt the rightful Executor or Adminiſtrator. And *Popham* and *Clinche* held ſtrongly, that neither ſhould it ſtand good againſt other Creditors; for then every Man would ruſh upon the Teſtator's Goods, and be his own Carver in payment. And whereas it was ſaid at the Bar, that the Lord *Anderſon*, upon an Evidence at

M. 40, 41 *E.* Co. *l.* 5. *f.* 30.

Guild-Hall had ruled it otherwiſe. *Popham* at another day of debate of the ſaid Caſe related, that the Lord *Anderſon* did deny that he ever ſo ruled, or was of that opinion; and farther informed, that both he and Juſtice *Walmſley*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Juſtice *Gawdy*, as alſo *Fenner*, if I miſtake not, changing their opinions, and concurring with the reſt, Judgment was given accordingly. In the debate of this Caſe queſtion was made, If ſuch an Executor by wrong pay a Debt to another Creditor by Specialty, whether this ſhall not ſtand firm and good, ſince he ſtands liable to Creditors ſo far as the Goods by him adminiſtred do amount. And it was agreed, by the better opinion at leaſt, that this ſhould ſtand firm and good; ſo as if the payment were out of his own Goods, he might retain to himſelf in lieu thereof ſo much of the Goods of the Teſtator: for here he doth not, as in the other Caſe, advantage himſelf by his own wrong. Yet that opinion, allowing this payment to Creditors, muſt, as I think, be underſtood with this difference, *viz.* that this payment ſhall ſtand as againſt other Creditors, but not as againſt the right

right Executor or Administrator: for then any stranger might usurp the Office of Executor, and take from him that liberty and election, to prefer which Creditor he will in first payment; yea, might take from the Executor power to pay himself before other, in case there were a Debt due to him, which were very unreasonable.

Of Addition and Alteration by the Statute 43 *Eliz. cap.* 8.

WE having considered what the Common Law is and willeth in the Premisses: let us now see what Alteration or Addition a late Statute hath made. In the last Parliament of the late Queen *Elizabeth*, consideration being had of subtile getting into Mens hands Goods of an Intestate by Deed of Gift, or Letter of Attorny, from one of small or no ability, to whom such subtile Contriver hath procured Administration to be committed, and so himself would stand free from the Suit of Creditors, the Administrator himself either not being to be found, or not being of any value to satisfie Creditors; it was therefore enacted, that every person receiving or having any Goods or Debts 5 *Point.*

of any Inteſtate, or any Releaſe or Diſcharge of any Debt or Duty belonging to him upon any Fraud, as aforeſaid, or without conſideration of or near the value, (except in ſatisfaction of ſome juſt and principal Debt, to the value of the Goods or Debts due from the Inteſtate) ſhall be charged as Executor of his own wrong, ſo far as the value of thoſe Goods and Debts amount, deducting all principal juſt Debts to him due, and Payments by him made, which a lawful Executor ought to have paid. Here have we a touch of all the parts precedent, or at leaſt three of them.

1. We have firſt a new Executor by wrong, though intermedling under the title of an Adminiſtrator.

2. We have a limit of the Charge by him incurred, ſutable to our former expreſſion.

3. Laſtly, we have to him an allowance of Debts owing to himſelf, or duly paid to others; which is more than we have conceived allowable to another Executor by wrong.

CHAP.

CHAP. XV.

Of Pleas by Executors, and which be best, which most prejudicial to them.

SInce amidst the Pleas pleaded by Executors there is such difference, as that some induce one kind of Judgment, some another, some drawing more loss and burthen upon Executors than others: let us consider of the differences, so as light may be taken to chuse the safest or fittest for each case.

Plea denying the Executorship. 21 *H.*6. 19, 20. Bro 62. 2 *E.*4. *f.* 4. 19 *H.*7. 15. *Libr. intr.* 332, 333. 33 *H.*6. 33, 34.

If an Executor do utterly estrange himself from the Executorship, saying, that he was never Executor, nor ever administred as Exec. (for that must be added) then if the Issue be taken upon the Plea, and it be found against him, the Plaintiff shall have Judgment to recover, not Damages only, but even the Debt it self, out of the proper Goods of the Executor, if none of the Testator's can be found to satisfie it. And this shall be thus not only where it is found that the Defendant was made Executor by the Will, and proved it, and so could not chuse but know it; but even also

where he had never proved the Will whereof he was made Executor, nor ever administred by virtue thereof: yea, though he did before the Ordinary refuse to be Executor of this Will, or to intermeddle with the Execution thereof; yet if any other named Exec. with him did prove the Will, or did not refuse to be Executor, let such other Refuser take heed of pleading that plea. For truth is against the first part of his Plea, *viz.* that he never was Executor; and so the Verdict, which must be *Veritatis dictum*, must needs pass against him, and make his own Goods liable as well to Debts as Damages. What if no other were made Executor, but this only who refused before the Ordinary? may he safely plead that he never was Executor? I think not, since he so was Executor before his refusal, that he might have released all Debts due to the Testator, and given away all his Goods; therefore I think he must plead specially, shewing his Refusal, and not generally deny his being Executuor. Nay, admit he never was once named, made, or intended to be made Executor, yet having pleaded this Plea, that he never was Executor nor administred as Executor, if it shall be found by Verdict that he

He was liable as soon as the Testator was dead.

he did administer or intermeddle as Executor, the same blow or burthen falleth upon him: for then the later part of this Plea is found untrue, yea the whole upon the matter, for by this Administring he became an Executor of his own wrong, and the denial of this Executorship by wrong or usurpation shall be as penal to him as the denial of a rightful Executorship. The like Law, where the Executor pleads a Release made to himself, or a payment of the Debt, or other performance of the Condition made by himself. Nay, I find in this later Case the Judgment entred generally against the Defendant, as against another for his own Debt, not being Executor. And the reason why the Law makes these so penal to an Executor is, because his Plea is not only false, but the falshood thereof was wilful, since it must of necessity be known to himself to be so. And lastly, for that all these Pleas, if they had proved true, had been perpetual Bars, at least against the Defendant: the first indeed had not been a Bar against another, being in truth Executor or Administrator. But if the Exec. had pleaded a Release made to his Testator, finding such a one among his writings, which

But if he did it as Administrat. it it otherwise; yet see that specially pleaded. *Co.* lib. intr. 148. a.

See *Co.* lib. Intrat. Judgment so entred. 145. b. *Read* and *Carters* Case.

Co. lib. Intr. 29. a. not first *de bonis Testatoris si*, &c.

See *Bro.* Ex. 22. these reasons for this diff.

33 H. 6. 23, 24.

So of other perform. *Co. Lib. Intr.* 153. and 6 *E.* 4. 1. 7 *E.* 4. 8. See *Bro.* Ex. 22. That the Book contrarily reported 34 *H.* 6. 22, 23. is erroneous, as was declared by *Finc. & al.* 23 H. 8. the Record being not so as the Book saith the Judgment was.

which yet was either forged, or never both ſealed and delivered by the Plaintiff as his Deed; or if he plead payment made by his Teſtator; neither of theſe Pleas found againſt him ſhall cauſe the Judgment to faſten upon his own Goods: ſo if he denied the Bond or Bill, whereupon the Suit is grounded, to be the Teſtrator's Deed. For in all theſe Caſes the truth being now known to him, he might honeſtly and reaſonably conceive it to be as he did plead. But what if he plead fully Adminiſtred, and this be found againſt him, which reſted in his own knowledge? ſhall not this falſe Plea expoſe his own Goods, in defect of his Teſtator's, to the ſatisfaction of this Debt? No, it ſhall not, for that though this were a falſe Plea, and that within his own knowledge, yet was it not a perpetual Bar; for if it had been ſo found as was pleaded, yet *Aſſets* coming after to the hand of the Executor, the Plaintiff ſhould then have Relief and Satisfaction out of theſe ſince accrued *Aſſets*. If any ask how *Aſſets* may after come, I will give him two or three inſtances. Firſt, it may be by recovery of Debts before withholden or of Damages for Goods taken away,

or

or by voluntary payment of a Debt not before due, for that the time of payment was not come. Secondly, if the Teſtator, having a Leaſe for twenty years, did demiſe the ſame to *J S* for the whole Term, if he ſo long ſhould live; if he were alive in time of the former Verdict, but now is dead, the Term continuing; this is now *Aſſets*, which before was not, whilſt it was but a poſſibility of a Term. Other inſtances might be given, but theſe may ſuffice. If the Executor pleaded that the Teſtator ſtood bound in ſuch a Statute, or that there was ſuch a Judgment againſt him of Debt to the King, beyond the ſatisfaction whereof the Goods would not reach; this is in effect a fully adminiſtred, though ſpecial, and not general; and the Law is alike (as I take it) in all theſe caſes, as to the not making of the Executor's Goods liable. But in all theſe Caſes, though the Debt ſhall not be adjudged upon the Executor's own Goods, yet the Damages ſhall, in default of the Executors Goods to ſatisfie them. And in theſe caſes it is not material whether the Judgment paſſed upon Trial or Demurrer. Nay, if the Defendant Executor plead no Plea, but confeſs the Action generally, or

Lib. intr. 148, 149. This good, though the Judg. were by *non ſum informatus.* and an averment that it was without Covin. Co. *Lib. intr.* 152. 11 H. 4. 6. There a *Cap. ad ſat.* was awarded for the Damages.

But he may, I think, forbear ſo to do, and to the Judgment for part, that when more *Aſſets* come he ſhall have more. *Lib. Intr. f.* 223.

or be condemned by *Non ſum informatus*; the Judgment is the ſame, *viz.* to record the Debt only out of the Teſtator's Goods, and the Damages of the Executor's Goods in default of the Teſtator's. What if the Executor Defendant confeſs that he have *Aſſets* to the value of part of the Debt, not of the whole? There for ſo much as is confeſſed the Plaintiff may pray, and have Judgment preſently without Damages, and may maintain for the reſidue of the Debt, that the Defendant alſo hath *Aſſets* for the reſt, and ſo go to Trial; as appears both by the printed Book of Entries, and another Manuſcript which I have. But what if this Trial paſs againſt the Plaintiff? Shall he then have an additional Judgment for Damages in reſpect of the former? I think he ſhall have Coſts, which commonly run with or in the name of Damages; but without a Writ to enquire of Damages, none being found by Verdicts, the Court doth not uſually adjudge Damages. Yet in the Book of *Entries* I find 6 s. 8 d. Damages aſſeſſed by the Court upon a Confeſſion in a *Writ* of *rationab. part. bonor.* againſt Exec. and this hath much affinity with an Action of Debt. Yea, in the very Action of Debt where the Ju-

Fol. 542.

rors

rors for miſcarriage after their departure from the Bar were fined, I find that the Plaintiff renouncing the Aſſeſſement of Damages by them made, and praying the Court to aſſeſs the ſame, it was done accordingly: but this was a ſpecial Caſe. *M.* 28 H. 6. *Ro.* 2. 321. *Lib. Intrat.* 329. 2.

Whereas we before ſhewed that an Executor denying his Executorſhip ſhall, if it be found againſt him, pay the Debt of his own Goods for his falſe Plea; this thereabout occurreth to be added, *viz.* that that is only where the immediate Executorſhip of the Defendant is denied. For if *B* be made Executor by *A*, and *B* dying makes *C* his Executor; now if *C* be ſued for the Debt of *A* as Executor of *B* Executor of *A*, and he denieth that *B* was Executor of *A*, which by conſequence is a denial of his being now Executor of *A*; yet if this fall out in Trial againſt him, he ſhall not in his own Goods ſtand liable to this Debt, becauſe it is poſſible that he might not know to whom his Teſtator was Executor. So if *A* made *B*, *C* and *D* his Executors, and *E* is ſued as Executor of *D*, the ſurviving Executor of *A*, if *E* deny that *D* his Teſtator ſurvived *B* and *C*, by conſequence whereof he denieth the truth, *viz.* that the Executorſhip of *A* is de- See *lib. Intr.* 322.

devolved to him, yet ſhall not this, found againſt him, charge his own Goods; for he might be ignorant of this point in fact, *viz.* whether *B*, *C*, or *D*. lived the longeſt. And here he denied not his own immediate Executorſhip, but a mediate or more remote Executorſhip. And ſo, I think, is the Law, where *C* being ſued as Executor of *B*, Executor of *A*, he pleads that *A* by a later Teſtament made himſelf Executor, which is found againſt him; ſo as here he falſly pleaded, and pretended himſelf to be the immediate Executor of *A*, and ſo denied the mediate Executorſhip, *viz.* of *B* to *A*, and of him to *B*. Yet *Quære* of this: for why ſhould not as well his falſe making himſelf an Executor immediate to the indebted Teſtator charge his own Goods, as well as his falſe denying of that Executorſhip; ſince both Pleas tend to the overthrow of the Plaintiffs Action, and each equally reſted in the Defendants knowledge? But this difference is between them apparent, *viz.* That the denial of Executorſhip, if true, is an utter and perpetual Bar to the Plaintiff, as againſt him ſo pleading; but the affirming of an immediate Executorſhip, where he was

ſued

ſued as Executor mediate, doth not ſo, if true, but directs the Plaintiff to a better Writ or Action, *viz.* againſt him as immediate Executor to the indebted Teſtator.

Whereas we have before touched upon the coming of *Aſſets* futurely to Executors, I think it is not amiſs to conſider a little the form and frame uſual in Pleas of fully adminiſtred, which thus run, *viz.* *Quod dict impetr. &c. plene adminiſtravit omnia bona & catalla quæ fuerunt præd. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. præd. S. temp. mortis, &c.* Lib. 11. 51.

Thus tying his denial upon the things which were the Teſtator's at the time of his death, what if then the Executor have at the time of this Plea pleaded Goods which were not the Teſtator's at his death, but ſince accrued, as before is ſhewed; or perhaps a Leaſe for years ſold by the Teſtator, upon condition to be void, if five hundred pounds not paid at ſuch a day, which happening after the Teſtator's death, and Default made, the Term returneth; or, if the Executor by a Writ of Error reverſe a Judgment given againſt his Teſtator for two hundred 7 H. 4. 39. Bro. 50. This Plea is not good, *per Cur.* becauſe ſome may have ſince accrued.

dred pounds, and ſo is reſtored thereunto? May the Plaintiff now reply generally, that he hath *Aſſets* which were the Teſtator's at the time of his death? How can the Jury ſo find, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a Precedent of a ſpecial Plea therein. But in reaſon methinks it ſhould be ſpecially, and not generally, pleaded and ſet forth in the Replication. And in caſe where one ſued as Executor denieth that he was ever Executor or adminiſtred as Executor, I find ſometimes the Replication general, that he did adminiſter, without ſhewing wherein or how; and ſometimes ſpecial, ſhewing what thing was adminiſtred, and where. Here note, that the Executor Defendant denying (as he muſt) two things, *viz.* 1. that he ever was Executor, 2. that he ever adminiſtred as Executor; the Plaintiff in his Replication is tied to maintain but the one of them, as the truth of the caſe is: that is, if in truth the Defendant were made Executor, but never did adminiſter, now it muſt be replyed that he was made Executor at ſuch a place, without ſpeaking any thing of his Adminiſtring: on the other ſide, if he did ad-

Lib. Intr. 322. b. but a place muſt be ſhewed. So 11 H. 6. 19, 20. Br. 62.

adminiſter, but was not made Executor, then only the Adminiſtring is to be replied. But if it ſhall be found that the Defendant had Adminiſtration to him committed, and ſo adminiſtred by virtue thereof, then is the Verdict to paſs for the Defendant, for this is no Adminiſtring as Executor; and upon a general denial thereof this may be given in Evidence, as the Lord *Dyer* reports to have been reſolved. But if the Plaintiff do in his Replication maintain both the Points, ſhall this make his Plea double? Methinks it ſhould; yet I find it ſo replied, and no exception taken for the doubleneſs, *Tr.* 17 *H.* 8. *Rot.* 28.

So done *Co. Lib. intr.* 104. b.

Mich. 13 & 14 *El.* Dy. 30.

Lib. intr. 312. b. *Tr.* 37 *Eliz.*

A Sole Woman being Executor maketh a Deed of Gift of the Teſtators Goods in truſt, but continueth poſſeſſion of them, and marrieth *J S*, who alſo hath poſſeſſion of the Goods, and in an Action of Debt by a Creditor fully adminiſtred is pleaded; now upon Evidence the Verdict ſhall paſs for the Plaintiff; for this Alienation, being fraudulent, was void to all Creditors, and ſo as to the Plaintiff the Goods continued the Teſtators, and ſo *Aſſets* in the Defendants hands, as was held in the *Kings Bench*. If fully adminiſtred be

pleaded where the Defendant hath *Aſſets* for part, but not ſufficient for all, and ſo it is found; yet ſhall not Judgment be given for the whole, but for part preſently, with a farther Award, that when more ſhall come to the Executor's hand, the Plaintiff ſhall then have farther Judgment for the reſt: ſo as that falſe Plea doth hi[illegible] no prejudice, but makes him in as good ſtate (the charges of Trial excepted) as if he had confeſſed himſelf to have part. And I think the Plaintiff upon that confeſſion of part may pray the like Judgment, without maintaining that the Defendant hath ſufficient for the reſt; for if that be not true, why ſhould he be put to the charge of a Trial by Jury? Yea, Sir *Edw. Coke* at the Bar *Tr.* 36 *Eliz.* ſaid, that where fully adminiſtred is pleaded, the Plaintiff is not tied to maintain the contrary, but may preſently pray and have Judgment to recover it when *Aſſets* ſhall futurely come to the Defendants hands: which was denied by ſome. But truly methinks the Law ſhould be as he ſaid, as well as in the former caſe, where for the part which the Defendant had not *Aſſets* to pay, it was ſo done, upon Verdict ſo finding. But there as I conceive,

Yet *Finch* 46 *E.* 3. *f.* 9. 10. held the contrary, *viz.* that Judgment ſhould be of the whole, but Execution only for ſo much, and a *Scire fac.* for the reſt when more *Aſſets*

See Coke *l.* 8. *fol.* 134.

ceive, it was not a preſent Judgment, but an Award that he ſhould have Judgment futurely; ſo as after when *Aſſets* come to the Defendants hands, the Plaintiff muſt have a *Scire facias* againſt the Defendant, to ſhew cauſe, not why he ſhould not have Execution, but why he ſhould not have Judgment, as I take it: yea, where it is found for the Defendant that he hath fully adminiſtred, yet was it held by all the Juſtices 33 *H.6.* 23, 24. and by *Priſot* 34 *H.* 6. 24. that when *Aſſets* after come to his hands, the Plaintiff ſhall have a *Scire facias* to have Satisfaction out of them: but that *Markham*, *Yelverton* and *Forteſcue* were of contrary opinion, and ſo was the whole Court 4 *H.6. fol.*4. And it ſtands with great reaſon, that where, upon a Verdict fully found againſt the Plaintiff, Judgment is given *Quod nihil capiat per Breve*, there he cannot have any Writ to execute the Judgment for him, but is put to a new Action of Debt: yet where it is found that the Defendant hath *Aſſets* for part of the Debt, but not ſufficient for the whole, there it is very congruous that the Plaintiff have preſently Judgment for part, and after, when more cometh, then by *Scire facias* againſt the Defendant obtain

So 19 *H.6. f.*37. 8 E. 4. *fol.* 25. See Judgment ſo entred *Co.* lib. intr. 151. b.

So 7 E.4 *f.*7.

Judgment and Execution for the reſt. for here both Verdict and Judgment were for the Plaintiff againſt the Defendant, whoſe Plea, that he had no Goods, was falſe, and ſo found by the Jury. And this difference was ſtrongly avowed by Serjeant *Henden*, *Mich.* 33, 34 *Eliz.* and after approved by *Fenner* Juſt. 36 *Eliz.* none contradicting it: yet a Book was cited, that the Plaintiff recovering ſo much as was found in the Executor's hands, ſhould be amerced for the reſidue; which *Popham* Chief Juſtice denied to be Law.

This 21 H. 6. 40, 41.

CHAP. XVI.

Where Judgment ſhall be againſt the Executors own Goods, though no Plea of the Defendant nor Vaſtation do ſo occaſion: and of the ſeveral manners of Judgment in ſeveral Caſes.

HOw by Waſting, called by us commonly a *Devaſtavit*, an Executor may draw down the Execution upon his own Goods, hath formerly been handled and diſcourſed of; as alſo what kind of

of Pleas do make the Executors's own Goods liable to the Debt, and what not. Now let us ſee where without Miſadminiſtring or Miſpleading, yet the nature of the Action ſhall lay the whole Debt or thing recovered upon the Executors own Goods. And this we ſhall find in ſome few Caſes. 1. Where an Executor is ſued for Rent behind after his Teſtators death, upon a Leaſe for years made to the Teſtator, and by him left to his Executor; here it ſhall be adjudged and levied upon his own Goods; for that ſo much of the Profits as the Rent amounted to ſhall be accounted as his own Goods, and not his Teſtators; therefore he is to be ſued as well in the *Debet* as in the *Detinet*, where in other caſes he is not, but in the *Detinet* only, being ſued as Executor. So if any thing delivered to or detained by his Teſtator come to his hands, and he ſtill detains the ſame after the demand, and be thereupon ſued in an Action of Detinue; for this is his own act. Nor in this caſe need he to be named as Executor, for he ſhall not anſwer Damages for his Teſtators detaining. So if he aſſume to pay of his Teſtators having *Aſſets*, and be ſued upon this *Aſſumpſit*, and which Debt is to be recovered in Dama-

ges, and that upon or out of the Executor's own Goods; yet is this Action, and the Assumption, which is the ground thereof, founded in the Executorship, and his having *Assets*; for if either he had not been Executor, or if he had not *Assets* at the time of the promise, it had been *Nudum pactum*, and would not have bound him, nor given good cause of Suit. Nay, to go farther, in the case of Assumption by the Testator, and Suit against the Executor thereupon, we find the Judgment in Mr. *Plowden*'s Commentary given against the Executor generally, as if he had not been an Executor, not fixing it upon the Testator's Good's; yet there the very Debt it self is included in the Damages. But contrarily was it after in the seventh year of the late King, *viz.* Judgment given, that as well the Damages as the Costs should be levied of the Testators Goods, if so much in value of them were in the Defendants hands; and if not, then the Costs only of the Goods of the Executor. And this surely is the righter and more just way: for there is no reason that upon a Promise, more than upon a Bond, the Law should cast the whole Debt upon the back and state of the Executor. But perhaps the

5 *Marie*, *fol.* 112. *Read* and *Norwood*'s Case.

Co. *lib. Instr. fol.* 1, 2.

two

two Judgments may be reconciled thus: The later was given upon a Verdict, *Non aſſumpſit* being the Iſſue, and there the Jury aſſeſſed Damages in certain, *viz.* 253 pounds, with the Coſts; ſo as here the Judgment was compleat and full, *viz.* to recover the ſaid ſum: but in the other caſe the Judgment was had upon a Demurrer, ſo as the Damages not being known, it was generally that the Plaintiff ſhould recover his Damages againſt the Defendant. *Sed quia neſcitur quæ damna*, &c. Becauſe it appeareth not to the Court what the Damages were, therefore a Writ was awarded to enquire of Damages, upon the Return whereof executed, the Judgment was fully and compleatly to be given of a Sum in certain: which ſecond Judgment it appears not by the Book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the ſaid firſt Judgment before Damages enquired of is not a plenary and full Judgment, but an Award of Judgment, hath been divers times reſolved; and that therefore any defect and inſufficiency in the Declaration may be ſhewed time enough after the firſt, and before the ſecond Judgment: Yea,

Tr. 30 *Eliz. Paſc.* 33. *E. in Com. Ban.*

if the Plaintiff die before the ſecond Judgment, though after the firſt, the Action falleth to the ground: ſo if the Defendant die: otherwiſe of death after full Judgment. But this notwithſtanding, and howſoever there were done upon the ſecond Judgment, methinks it were righter and fitter that the firſt Judgment ſhould expreſs that the Damages ſhould be had and levied out of the Teſtators Goods, for whom and in whoſe right the Executor is ſued.

So for Rent behind ſince the Teſtators death. *Co. l.* 5. f. 31. The Suit is in the *Debet* as for his own Debt, *M.* 14 & 15 *El.*

Another Caſe there is wherein the Judgment muſt be, as it ſeems againſt the Executors own Goods, *viz.* in an Action of Covenant for a breach of Covenant ſince the Teſtators death: for ſo was it held both by all the Judges of *Common Pleas*, except the Lord *Dyer*, and by the Prothonotaries in the late Queens time; where the Caſe was of an Houſe upon the Leaſe negligently burned in the Executors time, for which Damages only were to be recovered. And ſometimes where the Executor himſelf is to bear the burthen, I find the Judgment entred, that the ſum recovered ſhall be levied of the Lands and Goods of the Executor.

Lib. intr. 329. a. & b. *De terris & catallis*, &c.

CHAP.

CHAP. XVII.

Of Women-Covert Executors.

THere being two kind of perſons who have ſome diſability upon them, *viz.* Feme-Coverts or married Women, and Infants, touching whom we find in many places queſtion and diſcerptation in our Books, we will conſider of them by themſelves, or apart from others; yet not joyning them together neither, but each by himſelf ſeperately.

Firſt, therefore, of Feme-Coverts; touching whom we will conſider theſe three things.

Firſt, whether they may make Wills and Executors with or without their Husbands aſſent; and how, whereof, and in what caſes.

Secondly, whether they may be made Executors without their Husbands aſſent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the Executorſhip they may do without their Huſ-

Husbands, or their Husbands, without them.

Sect. 1. A Woman married, or Feme-Covert, we know is *ſub poteſtate viri, cui in vita contradicere non poteſt*, as ſaith the Writ given by the Law to the Wife for recovery of her Land after her Husbands death, being aliened by him. Therefore it is that Judges, when a Woman is to acknowledge a Fine of any Land, do examine her apart from her Husband, to know whether ſhe be willing, or come to do it by the compulſion of her Huſband: It is therefore hard for her to have freedom of will, and conſequently freedom to make a Will. Beſides, all her Moveables or Goods perſonal, which ſhe had at the time of her Marriage, otherwiſe than as Executrix or Adminiſtratrix, are by the Law totally deveſted out of her, and ſetled in the Husband as fully *ipſo facto* upon the very Marriage, as any other that were his own before. Of theſe therefore ſhe can make no diſpoſition, no more than of other her Huſbands Goods. But in caſe ſhe do by Will bequeath them, although the Will and Gift be void, yet if the Husband, as the caſe was in the time of *Edward* the ſecond,

Sola & ſecreta examinata.

Debts except, which are not properly goods.

3 E. 2. Fitz. Deviſe 24.

cond, do after his Wifes death conſent to this her Will and Gift, by delivering of the Goods bequeathed after her death, or aſſenting that the Legatee take them by virtue of ſuch Will and Gift; this amounteth to a new Gift by the Husband. If a Woman have a Leaſe, an Eſtate by Extent, a Wardſhip, the next Avoidance of a Church, or other Chattel real; theſe are not deveſted out of her into her Huſband by Marriage, but in caſe ſhe overlive him, they continue to her as before, no Alienation or Alteration having been made by the Husband, who had power to diſpoſe of them by Gift in his life-time, though not by his Will: yet ſuch a Woman in her Husbands life-time could not of or for theſe things, without her Huſbands aſſent, make an Executor or Will; but ſhe dying before him, they would, by the operation of Law, accrue to him. And here then obſerve a Caſe, though not frequent, yet full of miſchief when it happens: Suppoſe that a Woman indebted a thouſand pounds, and having Leaſes and moveable Goods to the value of three thouſand or four thouſand pounds, marrieth with *J S*, and then dieth before the Debt be recovered againſt

gainſt her; in this caſe the Husband ſhall have and go away with all this value of his Wife, and is not in Law liable to pay one peny of her Debts, becauſe he is neither her Executor nor Adminiſtrator. What the *Chancery* could do, or rather what the Lord Chancellor or Lord Keeper would do, in this caſe, I will not take upon me to ſay or determine. Another ſort or kind of Goods, or rather Intereſts, a Woman may have, *viz.* Debts or things in Action, which as the former, are not deveſted out of her by Marriage into her Husband, nor yet can ſhe thereof make an Executor without her Husbands aſſent, although they be one degree farther from the Husband than the ſaid Chattels real; for that though the Husband do over live the Wife, he ſhall not be entitled to them as to the former. But if his Wife make him Executor, as ſhe may, or if after her death he take Adminiſtration of her Goods; then, as he is thereby entitled to them, ſo is he liable alſo to pay her Debts out of the ſame, when he ſhall have received them.

During her life he is, but not after.

But the Husband may receive them or releaſe them.

12 H. 7 f. 22. The Husband was ſued in Spiritual Court as Executor to his Wife. So ſhe is often to former Husband and to Father, &c.

Laſtly, *Dato* that a Woman-covert is Executrix to ſome other perſon, and in that right hath Goods moveable; theſe

are

are not deveſted out of her, becauſe ſhe hath them not meerly to her own uſe, but as repreſenting the perſon of another: But whether then may ſhe without her Husbands licence or aſſent, in reſpect of her being an Executor, and for continuation of this Executorſhip, make Executors, and conſequently a Will, or not? Hereabout hath been much diverſity of opinion. Some Books generally ſpeak, that the Wife may make an Executor, but ſpeak nothing of the Husbands aſſent, whether neceſſary or not. Elſewhere we find it mentioned, that if the Husband after the Wifes death countermand (ſome Books, falſe Printed, ſay command) the proving of his Wifes Will, then it loſeth all force, or becometh void and of no value: but in this caſe is no mention in what ſtate this Wife ſtood, *viz.* whether ſhe were Executor or not, no not ſo much as whether ſhe had any thing in Action, or Chattel real or not, ſo as nothing in particularity can be grounded upon that Caſe. But there are expreſs opinions, that the Husbands aſſent is abſolutely neceſſary even in this caſe, ſo as without it the Wifes making an Executor ſhall be meerly void, and, conſequently,

39 H.6.f.27.

34 B f.8. Teſta- m 21.

18 E.4.f.11. Vavaſor Juſt.

quently, he to whom ſhe was Executor ſhall now by her death be dead Inteſtate. And of this opinion was *Babington* Chief
4 H.6.f. 31. Juſtice, in the beginning of *Henry* the ſixth his time. Yet contrary hereunto was the opinion of *Fineux* Chief Juſtice
12H.7.24.b. in the time of King *Henry* the ſeventh, *viz.* that where the Wife is an Executor, ſhe may alſo make a Will and an Executor without any conſent or aſſent of her Husband. And to this opinion doth Ma-
Tit. Deviſe f. 27. ſter *Perkins*, after conſideration of the Books on both ſides, incline. But ſome
Hil. 29 El. in Com. Ban. will ſay, that ſince all this, in the late Queens time this hath been contrarily reſolved, *viz.* in the caſe between *Andrew Ognell* Plaintiff, and *Underhill* and *Appleby* Defendants; in the end of which Caſe it is in expreſs terms ſaid to have been then reſolved, that a Feme-Covert or married Woman could not make an Executor without the conſent of her Husband. To this I anſwer, that this
Coke lib. 4. 31. b. Caſe is to be conſtrued with relation *ad materiam ſubjectam*, viz. to the matter and point in queſtion and under conſideration, which was that ſtate of a Woman whereof we have before ſpoken, *viz.* one having things in Action,

Debts

Debts or Duties to her belonging, as there in particular it was Arrerages of Rent due to the Woman before Marriage. As for the point of a Woman Executor to another perſon, it was never in that Caſe under diſceptation, no nor once mentioned in the Debate or Arguments thereupon. Now conſidering the very form and phraſe of Judgments at the Common Law, which are thus, *viz. Ideo conſideratum eſt per Curiam, &c.* not, *Adjudicatum eſt*, that is, It is conſidered by the Court, not in expreſs terms, that it is adjudged; this, I ſay, well obſerved, (as to me it ſeems very remarkable) gives us to know, that no more is adjudged than is conſidered of, the Judgment being contained and claſped up in the words *Conſideratum eſt*. Wherefore ſince in *Ognell*'s Caſe the point of a Woman coverts ability, in caſe where ſhe is an Executor, to make a Will and Executor, hath not been conſidered of, (the eyes, tongues, nor thoughts of the Judges being once ſet upon it;) it cannot be that that Point is there reſolved or adjudged. Beſides, even in a few words expreſſing, as to me it ſeems, the reaſon of that reſolution, it appears not

not to have been the intent of the Judges, that the ſame ſhould reach or extend to this Caſe of a Woman-Covert Executor: for it is added (as the reaſon of the Judgment, in my conceiving) that the Adminiſtration of the Wifes Goods doth of right belong to the Huſband; which amounts to this, in my underſtanding, *viz.* that where the Wifes making of a Will, and conſequently of an Executor, may be prejudicial to her Husband, and prevent him of ſome benefit or advantage, or tend to his loſs and diſadvantage, there it ſhall not be available or effectual without his aſſent; and therefore not in the Caſe of her, who, having Debts or Duties to her due, would, by making another to be her Executor, exclude or preclude her Husband from that benefit which to him ſhould pertain as Adminiſtrator of her Goods. Now as for the Goods, Debts or Credit to her as Executor to ſome other pertaining, no benefit could redound to the Huſband by having ſuch Adminiſtration of his Wifes Goods, for thoſe ſhould go and be the next of Kin of the Wifes Teſtator, taking Adminiſtration *de bonis non adminiſtratis* of him, if ſhe have no Executor;

Executor; and therefore her making Executor as touching these brings no hurt or prejudice to her Husband, and so is out of the reason of *Ognell's* Case. Since then it is so, and since the Law favoureth Wills, and it was by implication part of his Will who made her Executor, that she should have power to continue his Executorship, by making another to succeed therein after her decease, for performance of his Will; why should the Law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto? for, *Frustra est inutilis potentia*; even Reason it self flames and awards against him in this Case a *Quare impedit*, or rather a *Non impedit*, as to me it seems. Wherefore to conclude, I take it that the opinion of *Fineux* is good Law in that Point of a Femecovert Executor, though not in the other Point, where she hath only debts or things in Action to her self due; for therein the said Resolution in *Ognell's* Case, grounded upon good Reason, gives me satisfaction to differ from *Fin.* who making no difference between the Cases, held the Husbands assent needless in both. *Posito* then that the Wife of *J. S.* having Debts due to her self,

and being alſo Executrix to *J D*, makes without her Husbands aſſent *J N* her Executor, and dieth; what ſhall we now ſay? ſhall we ſay, that as touching the Goods and Credits or things in Action to her as Executrix of *J D* pertaining, this Will ſtands good, and *J N*, as her Executor, may prove it, contrary to her Husbands will? and that as to the Credits to her ſelf in her own right pertaining the Will is void, and thereof her Husband may take Adminiſtration? Shall ſhe die both Teſtate and Inteſtate, with a Will and without a Will? ſhall ſhe have both an Executor and Adminiſtrator? Why not, to ſeveral purpoſes, as well as where an Executor is made only for one particular thing or one place, the Teſtator may elſewhere die Inteſtate? And ſo where the Executorſhip is divided, as before is ſhewed, and one to whom part is committed will prove the Will, but the other to whom other part of the Executorſhip is committed will not take it upon him; here muſt needs be a dying for part Teſtate, and for part Inteſtate.

As for the ſecond Point, *viz.* Wives or Women-Coverts being made Executors, and ſo having the Office of Executorſhip

put upon them againſt their Husbands will, there hath alſo been diverſity of opinions. In the time of King *Edw.*1. *Brab.* Juſtice ſaith, ſhe may be Executor without her Husband, and the Adminiſtration ſhall be delivered to her only. And I think he meant that this might be without the conſent of her Husband, or whether he would or not; for ſo it is ſaid in the time of King *Henry* the ſeventh to be the Law Spiritual: and indeed in Courts Spiritual no difference is made between Women married and unmarried, for ought I can find. There a Wife ſueth, and is ſued, alone without her Husband; he intermedleth not, nor is intermedled withal, touching the things pertaining to his Wife. But at the Common Law it is otherwiſe; and there, as *Brian* Chief Juſtice ſaith, a Wife without the aſſent of her Husband cannot be Executor, he meaning thereby that the Husband may oppoſe and hinder it; for ſuch a one may be named Executor in and by a Will, without the knowledge of her Husband. Let us then ſee how after the death of the Teſtator the Husband can hinder her proving the Will, or intermedling to Adminiſter, ſince it may be a matter both of much

13 *Ed.* 1. Fitz. *Ex.* 119.

2 *H.*7. 15. *b.*

2 *H.*7. 15.

trouble and danger to him to have the Executorſhip faſten upon his Wife, and conſequently upon himſelf. On the other ſide, it may be a benefit and advantage to the Husband; and therefore we will alſo conſider, whether the Husband may (though his Wife would refuſe) aſſume the Executorſhip, and faſten it upon her. The Teſtator therefore being dead, and fame or common bruit carrying it to the Ordinary, that the Wife of *J S* is made Executrix; if ſhe come not in *gratis* or voluntarily to prove the Will, Proceſs or a Citation is to be ſent out of the Spiritual Court againſt her, to enforce her coming in to take on her the Executorſhip. She coming may clearly, as well as any other perſon, (eſpecially if her Husband concur with her therein) refuſe this Office, truſt and charge, ſo as if there be no other Executor named, the Ordinary muſt commit the Adminiſtration. If ſhe ſhould not come and appear, ſhe ſhould be Excommunicate, as I take it, notwithſtanding any allegation or intimation by her Husband of his unwillingneſs to have her take upon her the Executorſhip. But ſuppoſe ſhe doth come into Court, and offers her ſelf ready to take the Executor-

ſhip

ſhip upon her; and on the other ſide her Husband expreſſeth his diſ-aſſent thereunto, praying that ſhe may not have the execution of the Will to her committed: what will then be done? This, I confeſs, pertains to another Learning, and not to that of our Profeſſion. But forasmuch as I find, that in the Courts Spiritual a Wife ſtands in the ſame plight and ſtate as a Woman ſole, the Husband not intermedling withal in the affairs of the Wife; therefore do I conceive, that in that Court the Husbands refuſal will not be of force to hinder the committing of the Executorſhip to the Wife not refuſing; at leaſt if there come not a Prohibition to ſtay the Spiritual Courts ſuch proceeding. But whether a Prohibition be in ſuch a caſe to be granted or not, as I find no reſolution in my Books, ſo will I not take upon me to reſolve. This ſtands clear in the Rules of the Law of *Engl.* that the Wife is under the Husbands power, and cannot contradict him in pleading and doing other acts, even touching her own Freehold: nay, ſhe cannot take Lands nor Goods by gift or conveyance without her Husbands aſſent, as the Law hath been, and, for ought I know, is taken. But if once the

33 H. 6. 31. 43. 39 Ed. 3. 1.

27 H. 8. 24.

Will be prov'd, and the execution thereof committed to the Wife, though againſt her Husbands mind and conſent, I think it will ſtand firm; and the Husband and Wife being after ſued, cannot ſay that ſhe was never Executrix. And I doubt whether the Wife adminiſtring without the Husbands privity and aſſent, although the Will be not proved, do not conclude her Husband as well as her ſelf from ſaying after in any Suit againſt them, that ſhe neither was Executor, nor did ever adminiſter as Executor. Yet perhaps this Adminiſtration by the Wife, againſt her Husbands mind, will (as againſt him) be as a void act; elſe cannot I ſee how *Brian*'s opinion before cited, *viz.* that the Wife ſhall not be an Executor without or againſt her Husbands mind, can be Law. On the other ſide, if the Husband of a Woman, named Executor, would have his Wife to take upon her the execution of the Will, and to prove the ſame, but ſhe will not aſſent thereunto, (wiſhing, perhaps, that gain and benefit rather to ſome of her kindred by a way of Adminiſtration, than to her own Husband by her Executorſhip, as ſometimes Wives accord not well with their Husbands; (in this caſe I think

11 H 6.4. The Plea is, that the Feme did or did not adminiſter, without ſpeaking of the Husband.

33 H. 6. 31. The Husband may adminiſter, and prove the Will for his Wife.

think the Court Spiritual will not faſten the Executorſhip upon the Wife againſt her will. But *dato* that the Husband, though the Will be not proved, doth adminiſter as in the Wifes right, but againſt her mind and will; ſhall ſhe be now hereby bound and concluded, ſo as after ſhe cannot decline or avoid the Executorſhip? And ſurely I think, that during her Husbands life ſhe ſtands concluded at the Common Law, for that there ſhe ſhall not be nor can be ſued alone as Exec. and then being ſued with him, ſhe muſt joyn in Plea with him, *viz.* that ſhe neither was Executor nor adminiſtred as Executor; and then this act of her Husbands given in evidence will, as I take it, cauſe that the Verdict be found againſt her: not ſo after her Husbands death; then ſhe may refuſe, as the L. *Dyer* ſaith, and citeth as reſolved. Theſe things I thought good to offer to conſideration, and ſo leave them without reſolution. Difference perhaps may be where a Woman ſo made Executor taketh a Husband after the Teſtator's death, before either proving or refuſing to prove the Will, and where ſhe is made Exec. during the Coverture; as there in caſe of a diſcent of her Land to the Heir of a Diſſeiſor; for

1 *Eliz.* Dyer 166. b. there is cited 3 *Hen.* 112. *Nota per bill.*

when there is upon her ſuch a ſtate of Election, ſhe, marrying before her Reſolution or determination, doth upon the matter deliver it into the Husbands hands: not ſo where it firſt findeth and falleth upon her in the ſtate of Coverture. If the Husband were indebted to the Teſtator, this making of the Wife Executor is, as I take it, a Releaſe in Law, as well as if ſhe were the Debtor: but if after the Teſtators death ſhe do marry ſuch a Debtor, it is a Devaſtation.

The third Point.

Touching the Adminiſtration or Execution of the Office of an Executor by a Feme-covert and her Husband.

WE will now come to admit the Execution of the Will aſſumed by concurrent conſent of Husband and Wife, and the Will proved with both their likings in the Wifes name; and examine what acts the Wife of her ſelf is able to do, and what her Husband without her.

It hath been conceived by many of old, and by ſome of late, that if a Feme-covert or married Woman Executrix releaſe a Debt

Debt of her Teſtator, or give away the Goods which ſhe hath as Executor, or deliver a Legacy bequeathed, it was firm and good; and on the other ſide, that her Husbands Gift or Releaſe was of no value, for that the Adminiſtration or Execution of the Will is committed to the Wife only. And ſome have gone ſo far as to ſay, that ſhe may ſue or be ſued without her Husband, (in the Courts of Common Law, I mean; for in the Spiritual Court it is true, the Husband is not joyned with the Wife in Suit.) But the Law is doubtleſs in all thoſe points contrary, as not only ſome opinion alſo was of old, *viz.* in the time of *H.* 7. but alſo hath been in the late Queens time reſolved: for otherwiſe, if the Wifes Gift or Releaſe ſhould ſtand good, her act might exceedingly endamage her Husband, and make his Goods liable to the Creditors, the Teſtators ſtate being waſted by the Gifts or Releaſes of his Wife. Wherefore it was held in the ſaid late Caſe, that unleſs due payment were made to ſuch Women-covert Executors, their Releaſes or Acquittances be void, and ſo alſo their gifts and grants: yea, it was then held, that the Husband of the Wife Executrix may give Goods, or make releaſes of debt, at his pleaſure.

See 9 *H.* 6. 4. In Debt the Plea ſhall be, that ſhe hath fully adminiſtred; and Reply, that ſhe hath *Aſſets*, never mentioning the Husband.

33 *H.* 6. 11.

12 H. 6. 31. pleasure. But doubtless by Marriage neither are the Goods (though personal) which the Wife hath as Executor devested out of her and setled in her Husband, as her own Goods are; nor, if she die, shall they accrue to the Husband, if no alteration were of the Property, but shall go to her Executor, or to the next of Kin, being Administrator of her Testator, if she have no Executor: and so was it held in the first year of Queen *Mary*. Yea, though for any other Goods which the Wife had in her own right before marrying, the Husband alone, without naming the Wife, may maintain an Action of Trespass: yet touching such Goods as the Wife hath as Executor, the Action must be brought in the names of the Husband and Wife, to the end that the Damages thereby recovered may accrue to her as Executor in lieu of the Goods. So also must the Replevin for those Goods be in both their names. But although the Husband be thus named with the Wife, yet principally is it the Suit of the Wife; and therefore in such Actions, or in Debt by Husband and Wife, she being Executor, if it come to Trial by Jury, the Husband being an Alien, yet shall he not have

M. 31 El. in Com. Ban. If the Husband be to avow, it must be in the right of his Wife, Executor or Administrator. *Mansfield's* Case. Doctor *Julier* his Case.

have Trial *per medietatem linguæ*, or *alienigenarum*, that is, by half Aliens, as in other cases where an Alien is party to a Suit is to be had. And where to a Wife made Executor power is given to sell Land of the Testator's, she may sell to her own Husband, as was resolved in the time of K. *Henry* the seventh, where the Feoffees (it being Land setled in use) were committed to the *Fleet*, for that they would not execute an Estate to the Husband according to the Wife's State. But of this I much marvel, since the Law intends the Wife so under the Husband's command and subjection, that it holds not her disposition of Land to him by Will free, nor therefore of force; and how shall this then be conceived to be but a partial Sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a Woman under Coverture, doth in a manner subject it voluntarily to the Husbands will. And it hath been held by some, that even an Infants or Feme-coverts Conveyance in such case of necessity should stand firm and unavoidable, because of the Condition express or implied, that the State should be void if no such Conveyance made.

10 H. 7. 20.

Bro. Just. *Cui in vita* 15. She may sell to any other, but not to him.

Fenner Just. *in Ben. Reg. Pasc.* 37 *El.* & 34 *E.* 3. Bro. *cui in vita* 15. No prejudice to them, that it be good.

CHAP.

CHAP. XVIII.

Touching Infants, and their making or being made Executors.

BEing now to consider of disability by Age, for want of years in persons making or being made Executors; let us first take view of the several Ages of Men and Women, to several purposes material in the Law, Judgment, and Respect. And first, touching a Woman: 35 H. 6 41. b. *Wangford* in *Henry* the sixth his time shews, and other Books approve, that she hath six several Ages respected in and 1. by the Law. As first, the Age of 7 years, for her Father to have Aid of his Tenants 2. to marry her. Next, nine years, to deserve Dower, that is, that in case she be of that Age at the time of her Husbands death, she shall be endowed: but not if she be any thing under those years; the Law being Physically informed, that a Woman at those years may conceive a Child, 18 Eliz. c. 7. but not under them. But of somewhat different opinion was, as it seems, the Parliament in the late Queens time, when it was made Felony to have unlawful carnal knowledge of any Woman-Child under the

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age of ten years, it being then conceived, as I think, that no ſuch could conſent.
The Age of 12 years is a Womans time for aſſenting or diaſſenting to marriage in more tenders years had. For ſo it appears by divers Books; although Mr. *Littleton* have here no diſtinction between Male and Female. The age of 14 years is a Womans time to be in wardſhip, or not; ſo as if ſhe be any thing above thoſe years at the time of her Anceſtors death, ſhe eſcapeth wardſhip. The Age of ſixteen years is her time of coming out of wardſhip, being once fallen under it: for although had ſhe been full fourteen, ſhe had eſcaped it; yet not ſo being at the time of her Anceſtors death, her wardſhip laſteth till ſixteen years, except the Lord ſhall ſooner marry her. And laſtly, the full Age of a Woman, whereby ſhe is enabled firmly and unavoidably to make Grants or Conveyances, is 21 years, as well as for the Male; before which time, be it that ſhe being ſole make a Feoffment or other conveyance, or being married alien her Land by Fine and her Husband of full Age joyn with her, yet is it *infirm* and *avoidable*.
Now of the Male, or Man, the firſt Age material, and ſetledly reſolved on, is

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is twelve years; for at that time each Male is at the Leet, to ſwear his Fidelity to the King. This Women do not, and therefore are they never ſaid to be outlawed, but to be waved, becauſe they have not this admittance into the Law which Males have. This hath been, as I think, the ground of that ſpeech, that *Women are lawleſs Creatures.*

2. The ſecond Age of Males is 14 years, accounted by the Law the Age of Diſcretion, eſpecially material to two purpoſes; *viz.* Firſt, that if one under that Age commit an act amounting to Felony, yet is he to ſtand free from the Attainder and Puniſhment incident to a Felon. Regularly it is thus, but, *Non eſt regula quin fallat.* One of much leſs years, having attained ripeneſs of Diſcretion and diſcerning, ſhall incur the like Attainder
9 H. 7. f. 1. a. as one of full age: as was reſolved in the time of King *Henry* the ſeventh, touching an Infant but of the age of nine years, who having killed another Boy of the like Age with his Knife, and then hiding the ſlain Boy, and excuſing the Blood found upon him by ſaying that his Noſe had bled; it was held by the Judges, that he was to be hanged as a Felon,

Felon, his ſuch Non-age notwithſtanding. The other point, touching which this Age of fourteen years is eſpecially material, is touching an Heir of Lands held by Socage: for in caſe ſuch Heir be under that Age, he is to be in Ward to the next Kin; but if he be of that Age, he is not to be in Ward at all, for that the Law judgeth him to be of Diſcretion at thoſe years: and therefore a Guardian in Socage being in effect but a Bailiff accountable, he hath no need of ſuch an one, other than ſuch as himſelf ſhall chuſe.

The third Age in and touching Males 3.
material is fifteen years: for every Lord of a Mannor or one having Free-holders in Socage, or by Knights Service, when his eldeſt Son cometh to that Age, *viz.* fifteen years, is to have of them Aid for the making of him a Knight, towards which every one holding by a whole Knights Fee is to pay twenty ſhillings, and ſo ratably for more, more, and leſs, leſs; and each holding twenty pound Land in Socage is to pay the like ſum, and ſo ratably for more or leſs.

The fourth Age of Males is the full 4.
age

age of 21 years, which maketh him free from Wardſhip, having Lands held by Knights Service deſcended unto him; and alſo makes him able to alien Lands or Goods, makes firm his Bonds, Statutes, Recognizances, *&c.* For although at fourteen the Law judge him of Diſcretion, yet doth it not hold him fully ripe till one and twenty.

5. *Oblitum.* Another of 60. to exempt from being compelled to ſerve by the Stat. of Labourers. 23 E. 3. c. 1. W. 2. cap. 38. 13 E. 1. No. No. Br. 165.

The laſt Age of Males reſpected by the Law is ſeventy years: at which time Sheriffs are to forbear to impannel them in Juries; and in caſe they do not, ſuch old Man may have a Writ to the Sheriff, grounded upon the Statute for that purpoſe made in the time of K. *Edw.* 1. commanding ſuch Sheriff to forbear the impannelling of him, and he may have an Action to recover Damages upon that Statute. This is called by moſt *a Writ of Dotage*; a word, perhaps, anciently taken in a good and favourable ſenſe, *pro dote ætatis, viz.* a Gift, Priviledge or Exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of theſe ſeveral Ages, let us now ſee wherein and how Age is material touching them who are to make or to be made

made Executors, and what age is required thereabout. Maſter *Perkins* ſaith, that one of four years old may make a Will, and conſequently Executors; and his reaſon is, becauſe the Executors being to account before the Ordinary, it cannot be intended but that the Goods ſhall be diſtributed for the good of his Soul. He ſpeaks as if he only made an Executor by his Will, but did not bequeath any thing, but left all to the Executor's Conſcience and Diſcretion, which is not uſual, though feaſible, as before I have ſhewed, or ſaid at leaſt. But admit it were ſo, and no bequeſt at all contained in the Will; yet ſince at that Age an Infant hath no Diſcretion to elect a fit perſon to diſtribute his Goods, Mony and other things, no nor to make continuation of an Executorſhip to another, to whom perhaps the Infant was Executor; I cannot ſee that his Will ſhoulld be of any force: but if he be of the Age of 14 years, being the Age of Diſcretion in the Judgment of Law, then I ſhould hold him able to make a Will, although yet he be an Infant till 21 years, and can make no gift of Land nor Goods which ſhall be of force. And *Babington* Chief Juſtice, to other purpoſe, makes

Deviſes f. 97 No good reaſon, for on may ak an ill Account, eſpecially having a Childs direction for his doings.

9 H. 6 f. 6.

like diſtinction between an Infant of ſuch tender years, and one come to the years of Diſcretion. So alſo, as before we ſhewed, it is in the caſe of Felony. And that way alſo ſounds that which *Hank.* ſays in *Henry* the Fourth his time, *viz.* that an Infant of 18 years old may be a Diſſeiſor; as implying, that his years may be ſo tender, that, as *Candiſh* ſaith of an Infant in *Edward* the Third his time, he is not to be intended able to know or diſcern between good and evil: methinks therefore he ſhould be at the leaſt of the Age of Diſcretion, *viz.* 14 years, who ſhould be able to make a Will, and conſequently an Executor. And the Cuſtom for an Infant of fifteen years old to bequeath by Will hath, as to me it ſeems, affinity with this Opinion, though there the Caſe was of Land in a Borough deviſable by Cuſtom. And that way reflecteth the Caſe in the time of King *Henry* the Sixth, where it was ſaid, that an Infant under fifteen years of Age ſhould not wage his Law, *viz.* take an Oath to acquit himſelf of a Debt, or excuſe his Default in an Action real. And farther reaſon of this Opinion will ariſe out of the conſideration of an Infant made an Executor.

2 H.4.22.

40 Ed.3.44.

37 H.6.5.

11 H.6. f.40.6.

Now

Now touching an Infant made Executor, how young ſoever he be, the making of him ſo is not void; but yet the Execution of the Will, which is the performance of the Office of an Executor, ſhall not be committed to him till he come to the Age of ſeventeen years, by the Law Spiritual, and till then (for that he is not able to do the part of an Executor) Adminiſtration is to be committed to ſome other: Yet if it be a Woman-Infant who is ſo made Executrix, in caſe ſhe be married to a Man of ſeventeen years old or more, now is it as if ſhe were of that age, and her Husband ſhall have the Execution of the Will; and if Adminiſtration were before committed during the Minority of the Woman, it ſhall now ceaſe, as is ſaid in *Prince*'s Caſe. Yet I do a little marvel at theſe Opinions, conſidering that theſe things are managed in the Spiritual Court, and by that Law; and it intermeddles not with the Husband in the Wifes Caſe: now by that Law, and not our Common Law, comes in this limit of 17 years. And I have ſeen it otherwiſe reported in and touching the laſt Point.

Co. *lib.* 5. *fol.* 29. *p.*

M. 41 & 42 *Eliz.*

Farther touching Infants Executors,

and under the age of ſeventeen years, this is to be noted, *viz.* that ſuch an one is not able as an Executor to aſſent to a Legacy, ſo as it may by virtue thereof ſettle in the Legatee. Alſo if Adminiſtration be during ſuch Minority committed with ſpecial words of Reſtraint or Limitation, *viz.* that it is done to the uſe or profit of the Infant-Executor, then no Sale of Leaſe or Goods, or aſſent to Legacy, by ſuch Adminiſtrator, will bind or prejudice the Infant-Executor; but otherwiſe, perhaps, if the Adminiſtration during the Minority be committed generally. And if the Teſtator himſelf, making an Infant Executor, doth alſo appoint another to be his Executor during his Nonage, expreſſing it to be only for the benefit and behoof of the Infant-Executor; I doubt whether this temporary Executor ſtand any whit reſtrained from what pertains to the power of an abſolute Executor: for there may be, perhaps, difference between him to whom the Owner of the Goods comm'ts the government of them, though but for a time and in ſpecial manner, and an Adminiſtrator ſo eſpecially made by the Ordinary, another being preſently by the will of the Owner or Teſtator to have

Co.l.5.f.29. But payment is to be made to the Executor, and not to the Adminiſtrator, *M.15 & 16 El. in Com. Ban. Rep.67.*

Co.l.5.f.29.

Co.l.6 f.67.

have the Adminiſtration, in whom for a time legal defect is found. But now let us paſs over this Age of ſeventeen, and conſider of the Infant between that time of his being admitted to take upon him the Executorſhip, and his accompliſhment of his full Age of one and twenty. Firſt, then, ſuppoſe that he doth releaſe a Debt due to his Teſtator; whether ſhall this be good to bind him, and to diſcharge the Debtor, as well as if the Executor had been of full Age, he now having proved the Will, and being by the Law Spiritual approved an Executor able? And this Point coming in queſtion in *Ruſſel*'s Caſe in the late Queens time, conſideration was had of divers good Reaſons for enabling of this Releaſe; as that an Executor repreſents the perſon of his Teſtator, and in his right and power doth theſe acts and not in his own, and therefore his Infancy, which is a ſtate or condition of his own natural perſon, ſhall no more diſable him than it doth the King, a Major, or other Head of a Corporation. Alſo divers Books were found to run that way, as well in the caſe of an Infant, as of a Feme-Covert. But upon great deliberation in the *Kings Bench*, and

H. 26 Eliz.

16 *H.6. Re.* 45. 21 *E.* 13. 24.

upon conference had with the Lord *Anderſon*, *Manwood*, and other Juſtices, it was reſolved and adjudged, that the Releaſe of an Infant Executor, without payment of the Debt and Duty, would not bind or bar him. 1. For that if it ſhould, it would be a waſting or devaſting of the Goods of his Teſtator, and ſo would charge his own Goods. 2. It would be a wrong, which an Infant could not do by his Releaſe. 3. It was no purſuit nor performance of the Office or Duty of an Executor, but the contrary. And upon this Judgment a Writ of Error was brought in the *Exchequer-Chamber*, where it was agreed by all, that the Releaſe was not effectual nor binding, ſo as this Point now had the Reſolution of all the Judges of *England*. But it was agreed, that if payment or ſatisfaction had been made, then the Infant-Executor might have made a good Acquittance and Diſcharge; and indeed, Payment it ſelf, if proved, brings Diſcharge enough, except in the caſe of a ſingle Bill. Note, that the principal Caſe adjudged was not a Releaſe of any Debt or Duty, by Specialty, but of Treſpaſs in converſion of Goods found or taken in the Teſtator's life time. But *Poſito* that this

Co l. 5. f. 27.

Infant

Infant had aſſented to a Legacy, whether will this bind him or not? For in the Caſe of *Ruſſel* it is ſaid, that all things which an Infant doth according to the Office and Duty of an Executor will ſtand firm; now it is part of his Office to pay and execute Legacies. Yet ſince this act amounts to a Vaſtation or waſting of the Teſtator's Goods as well as the other, in caſe there remain not Goods ſufficient for payment of the Debts, and conſequently here, as well as in the other Caſe, the Infants own Goods would become liable to his Teſtator's Debts; I doubt, and incline, that it is not, nor can ſtand effectual: for except in the other we admit a want, or poſſibility of want, of *Aſſets* or Goods, the Releaſe could neither hurt the Infant himſelf, nor do wrong to any other; and that admitted, this Caſe is of like prejudice. Yet if theſe *Aſſets* ſhould be void, ſo alſo would be his payment of Legacies: and how then were he an able Executor at the age of ſeventeen years, to ſue and to be ſued for Debts and Legacies? And if upon Suit it cannot be ſhewed that Debts will take up all, or diſable the payment, then, haply, he may be forced to pay. *Quære*, notwithſtanding, whether

theſe Acts (though voluntary) ſtand not good upon *Bene eſſe*, or conditionally, *viz.* if there be beſides Goods ſufficient, *&c.* or that elſe the non-aged Executor may have an Action of Accompt for the Mony by him paid to the Legatee, and alſo avoid his Aſſent, where that is only needful. But doubtleſs, neither the Aſſent of ſuch Executor before the Age of 17 nor any payment of a Debt to him, could be good, although ſuch acts to or by another Executor before the proving of the Will would ſtand firm and good; for this Infant wants not only proving, but alſo ability to prove his Teſtator's Will; yea, the Will ſtands ſuſpended, and the Teſtator as it were Inteſtate, whilſt the Adminiſtration ſtands in force, ſo as during that time nothing can be done by any as Executor: and therefore there is great difference between the Caſes. What if payment of a Legacy be made to an Infant, can he make a ſufficient Acquittance? This, I confeſs, is beſides the Point in hand; yet becauſe it concerns Infants and Executors (though not Infant-Executors) it is not amiſs here to caſt ſome thoughts and words upon the Point, for that it many times perplexeth both Exec. and Legatees. Firſt, therefore, in caſe the Infant be of the

years

years of Diſcretian, *viz.* 14, I hold it clear, that any Payment to him made will ſtand good, for that the Law at that Age holds him able to govern and manage his own Lands held in Socage, and conſequently to receive the Rents thereof: wherefore, whether he who makes ſuch payment have any Acquittance or not, if he have proof of the payment, he is well enough acquitted from any ſecond payment; and if without payment he get an Acquittance, it will not ſuffice, the Infancy of him who makes the Acquittance conſidered. Beſides, if the Acquittance be, as moſt uſually they are, but ſigned only with the name of the Maker, and not ſealed, it is only an evidence or proof of payment, and no pleadable Acquittance, becauſe no Deed; ſo as it nothing differs from proof by Witneſſes, ſave that it is not mortal, as they. But now if the Infant be under the years of Diſcreon, what ſhall we ſay to a payment to him, eſpecially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be uſed by the Exec. generally; and the ſureſt way is, if he fear to keep it in any reſpects, to pay it into the Court where it is recoverable, *viz.* where the Will was proved: yet the Caſe ſo may be, as that this pay-

Notes of Receipts, called Acquittances.

payment may not be at all ſafe for the Executor. As put the caſe that he entred into Bond or Statute, to pay all Legacies by ſuch a day to the ſeveral Legatees; here, I think, the payment into the Court Spiritual ſufficeth not, for that muſt make the Receipt to be with ſome charge, which is in ſome kind an Abatement: there I think therefore, legally to ſecure the Executor, the payment muſt be to or in the preſence of the Guardian, becauſe of Nuriture, *viz.* him or her who hath (though not as Guardian in reſpect of Lands) the Cuſtody or Education of the Infant; for otherwiſe, to pay it into the hands of ſuch a tender Infant, ſeparate from any Governour or Guardian, were to expoſe it to loſs, both for that he is not able to count the ſum, and for that he, yet not being come to diſcerning years, were alike, with *Æſop*'s Cock, to part with Pearls or Coin for Plums and Trifles of no value. But in caſe no Bond nor other collateral Penalty lie upon the Executor, or in caſe the Bond or Statute be only to perform the Will generally, which nothing alters the courſe of payment which by the Will the Law lays upon Executors; then is not the Executor put to any ſuch payment, nor

Quere.

nor need pay without Demand and Acquittance, as in caſe of payment upon a ſingle Bill, or of Rent-ſeck, where no Diſtreſs can be taken, nor other Penalty incurred. Yet in that Caſe, if Demand be, and Acquittance ready to be given, let the Executor take heed, in caſe he be bound to performance, that he ſtand not upon the invalidity of the Acquittance in reſpect of Nonage; for, as I have ſaid, proof by Witneſſes may ſupply a nullity of Acquittance, and much more the Weakneſs or Imbecility: payment according to the Teſtator's appointment being the matter which acquitteth the payer, and this the Executor may have teſtified under the hands of divers Witneſſes expreſſing circumſtances, ſo as all dying, he may continue ſafe from ſecond payment as well as if an Acquittance had, the Witneſſes whereunto are ſubject to mortality as well as the other. But herein Courts of Equity do often interpoſe helpfully for them who ſeek not evaſion from payment, but only ſecurity in paying. And of Infant-Executors, and, by occaſion thereof, of Infancy in Legators or Legatees, thus much.

CHAP.

CHAP. XIX.

Of Legacies.

ALthough theſe be not recoverable at and by the Common Law, but moſt naturally at and by the Law Eccleſiaſtical; yet by Suits in Courts of Equity, as the *Chancery* and *Courts of Requeſts*, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occaſions ſo to do. We will therefore conſider thereabout theſe Parts or Points, ſome whereof have been in part before touched upon other occaſions.

1. Whether any Legacy in certain, and lying in prender, may be taken or had, without the Executors aſſent by the Legatee, or him to whom it is bequeathed.

2. When an Executor can or ſafely may pay, deliver or aſſent to a Legacy.

3. Whether one Executor alone may do it; and what if the Executor be an Infant, or Woman-Covert.

4. What ſhall amount to an Aſſent of the Executor,

Executor, and what to Diſaſſent or Diſ-
ablement of aſſent.

How a Leaſe or Chattel real may be given to one for a time, with remainder to another; how not. 5.

Where an Aſſent to the firſt, or one part of the Bequeſt, ſhall imply or amount to an Aſſent for the reſidue. 6.

Of the manner of Aſſents, and therein of Aſſents conditional. 7.

What manner of Intereſt he in the Remainder of a Leaſe after the death of another hath during the life of that other; and whether he may diſpoſe of it during that time, and how. 8.

Whether this Remainder can be defeated by any act of the Deviſee for life, or by the death of him in Remainder firſt. 9.

By what acts or accidents a Legacy may be forfeited or loſt, and therein of Revocation, death before, *&c.* 10.

Whether the Executors Aſſent ſhall have relation to the Teſtators death, and ſhall make good a Grant before made by the Legatee. 11.

If the Exec. give it to another, the Legatee hath no remedy at the Common Law, *per Priſot.* 37 H. 6. 30.

As for the firſt, we have before ſhewed the Aſſent of the Executor to be neceſſary before any Legacy can be had, for that Debts are firſt to be paid, and that the Exec. is

is to look to at his peril. But hereto add a little out of M. *Swinborne*, a learned Civilian, who ſaith, that in caſe any Goods be in the hands or cuſtody of *J S*, and the Owner doth bequeath them to him, then may he keep or retain them againſt the will of the Executor, ſo as there be other ſufficient Goods in the hands of the Executor for payment of all Debts: but though thus (as it ſeems) it would ſtand in the Eccleſiaſtical Law, yet for that no property is transferred to the Legatee without the Executors aſſent, therefore, doubtleſs, the Executor may at the Common Law recover the thing withheld, or Damages to the value, againſt the Legatee detaining it. Another Caſe there is, wherein, as the learned Civilian ſaith, the Legatee may take to him the thing bequeathed lying in prender, *viz.* Horſe, other Beaſt, or piece of Plate, or other like thing known, and in being; and that is, where the Teſtator doth expreſly ſo appoint by his Will. But herein, doubtleſs, the Common Law, at and by which Debts are recoverable againſt Executors, will oppoſe the Law Spiritual: for elſe by ſuch appointment the Teſtator might cauſe all his Goods to be taken by Legatees, and that none

none ſhould remain to pay Debts. Yet if there be other Goods beſides ſufficient for payment of Debts: then indeed I ſee not how the Executor can hinder ſuch taking, without violating his Oath taken for performance of the Will. If any ſay, that it is alſo a breach of Oath in the other caſe; I ſay, he obſerveth not that there that clauſe in the Will, being againſt the Law, is void, and conſequently, there is a Nullity upon it, and it is as if no ſuch thing were in the Will, and ſo the Oath extends not to it. And as a Chattel ſhall not be transferred to a Stranger without the Executor's aſſent; ſo if the Deviſe be to the Executor himſelf till he elect to take as Legatee, it ſhall be to him as Executor, as appears by the ſtrain and Argument of two Caſes in *Plowd. Comment.* And more lately in the *Kings Bench*, the Point being divers days argued, was at laſt ſo reſolved by three Judges againſt one. And the reaſon of *Coke* at the Bar was very good, for here the Executor ſuſtains two perſons, *viz.* an Executor and Legatee, and ſo all one as where the Bequeſt is to another; for, *Quando duo jura concurrunt in una perſona, æquum eſt ut ſi eſſent in diverſis.*

Welchden & Elkington Paramour & Yardly, Portman and *Simmes* Caſe *Trin.* 37 *El.* All but *Gawdy* ſo agreed.

As

As for the ſecond Point, it may have theſe two parts: Firſt, when the Executor is able to give ſuch aſſent to a Legacy; and ſecondly, when he may do it with ſafety. As for the firſt, he is able before Probate of the Will to aſſent unto the Execution of a Legacy, as elſewhere is ſhewed, and that although he be not of full age of one and twenty years: but if he be under ſeventeen years, ſo as he is not able to take upon him the Office of an Executor, and therefore Adminiſtration is during that time to be committed to ſome other; here his Aſſent is not of force or effectual, as we find, in *Prince*'s Caſe, to have been held in the Caſe of *Pigot* and *Gaſcoin*. As for the ſecond part, till all Debts be payed, the Executor may not ſafely conſent to put the Legatee into the Leaſe or Chattel deviſed; no more than he may pay Mony bequeathed, if there be not ſufficient alſo to pay all Debts. Of theſe things more is ſaid elſewhere. Yet becauſe the Reader, or he that deſires direction in theſe Points, will look for them under this Title, I thought not good here to be altogether ſilent touching them.

21 El. Dyer 367.

Co. l. 3. f. 29.

As for the third Point, *viz.* Whether the

the Aſſent of one Executor, where there be many, be ſufficient; I ſee not how to doubt: ſince any one Executor may give away any Goods of the Teſtators, or releaſe any Debts due to him, therefore much more aſſent; which is no more or greater work, in effect, than an Attornment of one Leſſee upon a Grant of a Reverſion. And if there want to pay Debts, he only who aſſented ſhall anſwer for it of his own Goods, and not his Companions. But if this Executor be either under the age of ſeventeen years, or under Coverture, *viz.* a Woman married, ſuch is not able to give a good Aſſent to bind the others, no nor themſelves, for then thereby the Infant might draw a Debt upon himſelf, and the Wife upon her Huſband, by aſſenting to or paying of a Legacy, there not being ſufficient Goods to pay all Debts. But the Husbands Aſſent is ſufficient where the Wife is Executor; for his act, whom ſhe hath choſen to be her Head, may prejudice as well her as himſelf; yea, though ſhe were within Age, yet he being of full Age, his Aſſent will ſtand good. But if he or another Executor in his own right be above 17 years of age, or elſe under 21, I doubt whether now

6 H. 7. 5. If the Bequeſt be to one of the Executors, he may take it without aſſent of his Companions; yet if a Debt, his Companion may releaſe. H. 48 E. 4. 14, 15. So held where but one of the Executors during Nonage aſſented in the Caſe of *Rheterick*, and *Chappel*. H. 9 *Jacob*. Rot. 87. in Ban. Reg. C.

his Aſſent will be ſufficient at leaſt, except the caſe be put, that there be *Aſſets* ſufficient, which perhaps there may be material, though not in the other. See more hereof after in the Title of Women-covert and Infants Executors.

As to the fourth Point: firſt, there may be an Aſſent and Election implied as well as expreſs: for if in the Deviſe or Bequeſt the Legatee be appointed to do ſome act as in reſpect of the Legacy and the Executor doth accept the performance thereof, this amounteth to an Aſſent. So if the Deviſe be to an Executor for the Education of ſome Children, which he doth accordingly educate, this makes an Election to have the thing by way of Legacy, and not as Executor, as appears by the Caſe of *Paramour* and *Yardley*, *Plowd.* 543. So if an Horſe be bequeathed, and one offering to buy him of the Executor himſelf, he directeth him to go and buy the Horſe of the Legatee, or if the Executor himſelf offer Mony to the Legatee for the Horſe; this implieth an Aſſent that it ſhould be the Legatees by the Will: and ſo was it held in the Caſe between *Low* and *Carter*, where the Deviſee of a Term did grant it to the Executor;

See *Co. Lit. Int.* 150. the Executor being Deviſee for life, ſaid the other ſhould have it after her death, and he entred, and took Adminiſtration, ſhe dying Inteſtate, yet held *Aſſets* in him. This *M.* 19 *H.* 7 *Ro.* 318 See *Lint.* 321 One gave the third part of his Goods to *A*, with whom the Executor accounted for the Amount and *A* ſued for that ſum in Debt: but no Judgment upon Demurrer. *Tr.* 37 *El. in B. R.* Where Bequeſts to the Executor himſelf.

cutor; and this Acceptance of a Grant from him was held to imply the Executors Aſſent, that it ſhould be his to grant. But I ſee not well how that ſhould be Law which in the later part of the L. *Dyer* is found, *viz.* Where a Term was deviſed to *J S*, and he was made Executor, and after the death of the Teſtator entred and occupied the Lands a whole year without proving the Will, that this was an Election to have it as Deviſee, and not as Executor. For, firſt, he had good right to the Term as Executor before Probate, and ſo might clearly in that right have taken the Profits, although it had not been deviſed or bequeathed to him, and that before any Will proved. Secondly, he could not by right have it as Legatee, without Aſſent of himſelf or ſome other as Executor. Therefore this general Acceptation can determine no Election, as elſewhere is held. As for Diſ-aſſent or Diſablement to aſſent: As if the Executor do once declare his Aſſent that the Legatee ſhall have his Legacy, he may then enter into it or take it, notwithſtanding the Executors Countermand or revocation of his Aſſent after; ſo, on the other ſide, I think, if he fully and expreſly deny that the Legacy ſhall take effect,

Tr. 37 *Eliz.* If he by Will bequeath it to *J S*, this is an Election to have it as Legatee.

he cannot after make a good Aſſent thereunto, for that Election once made muſt ſtand peremptory, be it Refuſal to aſſent, or Aſſent. Yet *Quære* of this, for that the Refuſal to aſſent may be checked by Sentence or Decree in the Spiritual Court or Court of Equity, and ſo an Aſſent be enforced. But if the power of Aſſenting be legally loſt by the means aforeſaid, *viz.* diſabled, I ſee not how any legal Intereſt can be transferred by that compelled Aſſent, howſoever decreed. And what is ſaid of a Legacy bequeathed to another, the ſame may be underſtood in caſe where the Bequeſt is to the Executor himſelf, and he makes his Election to have it as Legatee, or as Executor. But if where an Horſe is bequeathed to *A*, the Executor after the Teſtator's death doth ride the Horſe, or uſe him in the Coach or in the Plough, I do not take this to be any ſuch Diſagreement to the Execution of the Legacy, as that the Executor cannot after aſſent to the Legatees having thereof, no more (though it be ſomewhat more) than where a Drinking-Cup is bequeathed, and the Executor after the Teſtators death doth uſe it to drink in: nay, if a Leaſe of Land be bequeathed to *A*, and

So if the Executor take a new Leaſe, his Aſſent after is void. *Tr.* 37 *Eliz. Carters* Caſe 19 *El.* Dy. 359.

and the Executor continueth the Depaſturing of the Teſtators Cattel therein; yet is not this any Diſagreement to the Execution of the Legacy. But if this Leaſe-Land were let out by the Teſtator from year to year, and the Executor diſchargeth the Tenant, and taketh it into his hands at the years end; this I conceive to be a Diſ-aſſent to the Legacy: and ſo alſo perhaps may his taking or diſtraining for any Rent thereupon due after the Teſtators death. Yet am I not reſolute that the Diſaſſent is ſo peremptory and unchangeable as the Aſſent, remembring the Caſe in K. *Henry* the eighth his time, where a Term being granted by a Leſſee conditionally, ſo as the Aſſent of the Leſſor could be had by ſuch a day; though the Leſſors Aſſent were at one time denied, yet might it be yielded at another, ſo as it were at any time before the day. But yet there it was held, that if no time of Aſſent were limited, then one expreſs Denial or Refuſal would be peremptory, ſo as the Refuſal were expreſſed to the party to whom the Aſſent was to be given; otherwiſe, if it were but in ſpeech to or amongſt Strangers. This and the former Caſe 19 *Eliz.* give the beſt light to this Point that

14 *H.*8. 23.

Dy. 359. After choice once made, no variation.

I remember. Now for Diſablement to aſſent, it was held in the forementioned Caſe of *Low* and *Carter*, that where a Term is bequeathed to *A*, and after the Teſtators death the Executor takes a new Leaſe of the ſame Land for more years in poſſeſſion, or to begin preſently; now by this was the Term left by the Teſtator ſurrendred and drowned, ſo as it could not paſs to *A* by the Executor's Aſſent after.

As to the fifth Point, *viz.* In what manner a Leaſe for years or other Chattel real may be bequeathed to one for a time, with Remainder to another; it hath been heretofore much doubted, when a Leaſe for years was bequeathed to one for life, or for ſo many years as he ſhould live, whether the limiting of a Remainder thereof after his deceaſe were of any validity in Law or not. And this doubt had this ground: Any State for life in the Judgment of Law is greater than any Term for years: therefore when a Termer hath by his Will given his Term or his Houſe or Land which he ſo holdeth for years to one for life, or for ſo many years as he ſhall live; this Teſtator and Deviſor hath not in the judgment of

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the Law any Eſtate remaining in him; and therefore it was thought very hard for him to give or limit a Remainder to another. But after many arguings and debatings, it was in the late Queens time reſolved, that ſuch a Remainder was good; and that if the firſt Deviſee died before the Term expired, that then he to whom the Remainder was limited might enter and enjoy the reſidue of the Term. As for the giving of part of the years to one, and the reſidue to the other; *viz.* if the Term being twenty years, the Leſſee bequeathed ten thereof to his Wife, and the Remainder to his Daughter; of this no doubt ever was but that it was good: for that after the firſt State limited, there remained a farther Term, *viz.* ten years more in the Deviſor, whereof he had power to diſpoſe; whereas in the other Caſe, after the Term limited to one for life, there remained but a poſſibility that this life ſhould not take up the whole Term. But now, put we the caſe a third way, *viz.* that the Termer deviſeth or bequeatheth the thing in Leaſe to one Child in tail, with Remainder to another, and dieth, and the firſt entreth and dieth without iſſue; now

Plow. *Com.* 520 & 522.

whether ſhall the next in Remainder or the Executor of him ſo dying have the Term reſidue? And this Caſe came in queſtion and was adjudged about the middle of King *John* his Reign in the *Exchequer*: for there, Maſter *Hamond* holding by Leaſe for years from the Crown the Manner of *Akers* in *Kent*, deviſed the ſame by his Will to *Alexander Hamond*, his eldeſt Son, and the Heirs-males of his body, with Remainder to *Ralph Hamond*, another Son, in like manner, and the like Remainder to *Thomas Hamond*, and made the ſaid *Alexander* Executor, who after his Fathers deceaſe elected to take as Legatee, and after *Ralph Hamond* died, leaving Iſſue male, and making his Wife Executrix: *Alexander*, not having Iſſue male granted the whole Term by Deed to *B* and *C* for the behoof of himſelf and his Wife during their lives, and after to the uſe of his youngeſt Daughter, whom Sir *Robert Lewkenor* married. Then *Alexander* dying without Iſſue male, the Wife and Executrix of *Ralph Hamond* entred, claiming the Term, and being kept out, ſealed a Leaſe; whereupon an *Eject. firmæ* was brought, and a Jury appearing at the Bar in the *Exchequer*, found a ſpecial Verdict

Both *Alexander* and *Ralph* were Executors; but that makes no difference.

dict in effect *ut ſupra*. And in argument of this Caſe, firſt the main Queſtion was, whether the Caſe were all one in Law with the former, where a Term was deviſed to one for life, with Remainder over, ſo as by the death of *Alexander Hamond* without Iſſue male the Term ſhould go to the next in Remainder, as in the other Caſe, by the death of the Deviſee for life, dying within the Term, it ſhould do? And on the Plaintiffs part it was urged to be all one, ſo that by virtue of the Bequeſts *ſupra*, *Alexander* had an Eſtate to him and his Executors only ſo long as there ſhould be Heirs-males of his body; and he dying without ſuch Iſſue, the Term remained to the Executors of *Ralph*, who had the Remainder in like manner, and left Iſſue male, which ſtill lived, and ſo that State of *Ralph* yet had continuance. For it was admitted by the Counſel on that ſide, that the Term could not go to the Iſſue male of *Ralph* according to the words and intent of the Will, ſince it was impoſſible to make a Term to deſcend without an Act of Parliament. This therefore they ſaid the Law ſhould work, which was neareſt to the intent, *viz.* that after *Alexanders* death it ſhould

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go first to his Executors and Aſſigns, ſo long as Iſſue male of his body doth continue; and for want of ſuch Iſſue, then to *Ralph*, his Executors and Aſſigns, ſo long as his Iſſue male ſhould laſt: and therefore in this caſe, the Iſſue male of *Alexander* failing, the Executor of *Ralph*, whoſe Iſſue male faileth not, ſhould enjoy the Term; and ſo Judgment ought to be given for the Plaintiff being Leſſee of that Executor. On the other ſide it was ſaid by the Defendants Council, that this Caſe differeth much from the other Caſe, where the Term or Land held by Leaſe is given but for life to the firſt, with Remainder to another; which Caſe, as having been often reſolved, was clearly admitted to be good Law; for in that Caſe the intent of the Teſtator might and did take effect. But in this Caſe, if the Land ſhould go to the Executors and Aſſigns of *Ralph Hammod*, it muſt go againſt the intent of the Teſtator, whoſe mind and will was, as it appears by his word, that it ſhould go only to the Iſſue male of one Son after another, and not to any Executors. Now then, ſince this intent was ſo contrary to the Rules of Law, that it could not take effect, there-

therefore it muſt be void, and ſo all the words of Heirs-male ſtanding void, the Will is to be conſtrued as a ſole and abſolute Gift and Bequeſt to the ſaid *Alex.* and conſequently the Term muſt go to his Executors and Aſſigns. And for this Point, reſemblance was made to a Caſe reſolved in the *Kings Bench*; where a Leaſe was made by Indenture to *A*, *Habend.* to *A*, *B* and *C* for their lives: now becauſe *B* and *C* could take nothing, it was reſolved that *A* ſhould not have it for their lives, but for his own only. This Caſe was ſaid to come very cloſe in reaſon to the Caſe in queſtion: For as here the intent of the Leaſe was that *B* and *C* ſhould be eſtated for their lives, and, ſince that could not be, therefore the naming of them ſhould be utterly void, and as if they had not at all been named, and their Lives ſhall not ſtand as a meaſure for the Eſtate of *A*; ſo in the other Caſe the intent of the Will being, that the Leaſe or Land leaſed ſhould go to the Heirs-males of the body, firſt of *Alexander*, and after of *Ralph*, ſince this cannot be, therefore the words and name of Heirs-males ſhould ſtand for a mere Blank and Cypher, and not to mea-

Windſmore & Holford *vel* Holbord *M.* 28 & 29 *El.* argued, and *Tr.* 29. *El.* adjudg.

meaſure out any State to the ſaid *Alexander* and *Ralph*, and their Executors and Aſſigns. Alſo it was ſaid on the Defendants part, that an Eſtate for life in the judgment of Law is of ſo ſhort and uncertain continuance, that if *A* make a Leaſe to *B* for his life, and after makes a Leaſe of the ſame Land to *C* for years, now ſhall not this later Leaſe be void abſolutely for any part of the Term, but ſhall ſtand in expectation of the death of *B*, and, as ſoon as he dieth, ſhall take effect immediately: whereas if the Leaſe to *B* had been for ten years, or any like Term, then the Leaſe to *C* ſhould have been void for ſo many years of his Term. Thus it appears that a State for life is very momentary in the judgment of Law, and not reputed of any certain continuance ſo much as for a day. But it is otherwiſe of an Eſtate-tail, ſo that if *A*, having given Land to *B* in tail, doth after (without Indenture which makes an Eſtople) make a Leaſe to *C* for 21 years, and then *B* dieth without Iſſue during the Term, yet ſhall not the Leaſe take effect, becauſe it was utterly void at the firſt making. For an Eſtate-tail, being a ſtate of Inheritance, may in the intend-

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ment and judgment of Law have continuance for ever, as appears both by the Caſe of *Adams* and *Lambert*, where it is held within the Statute of Chanteries, which ſpeaks of Gifts to have continuance for ever. Therefore a Reverſion upon an Eſtate-tail is no *Aſſets*, nor giveth cauſe of Receipt; otherwiſe in all theſe Caſes it is touching a Reverſion expectant upon a State for life. Again, it was ſaid by the Defendants Council, that an Eſtate may be limited to *A* and his Heirs during the life of *B*, with Remainder to *C*, as in *Chudley*'s Caſe was reſolved; but if Land be given to *A* and his Heirs ſo long as *B* ſhall have Heirs of his body or Heirs-males, with remainder over to *C*, this Remainder is utterly void. So as there is in the judgment of Law a great difference between the largeneſs and continuance of an Eſtate-tail, and of an Eſtate for life. And if (which is worth the obſerving) a Fee-ſimple cannot afford a Remainder to be drawn out of it after ſuch a Gift to one and his Heirs, during the continuance of an Eſtate-tail, or of the meaſure thereof; much leſs can a Term yield ſuch large thongs to be cut out of it, as a Remainder after an Eſtate

Eſtate to one ſo long as he ſhall have Heirs of his body, or Heirs-males, which
28 H. Dy. f. 7. is all one. And in this Caſe the Remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of contrary opinion, as the Lord *Dyer* ſheweth. Farther it was ſaid, that if ſuch a Conveyance by Will ſhould ſtand good, it would raiſe a Perpetuity, not to be cut off by any Recovery.

But whereas the Caſe of *Hammond* hath been related before, ſo as by way of admittance it was argued as a Gift and Bequeſt to *Alexander Hamond* and the Heirs-males of his body, with Remainder in like manner to *Ralph*; the truth of the Caſe was, that the words of the Will were only to *Alexander* and his Heirs-males, (not ſpeaking of his body) and ſo to *Ralph*; which, as was urged by the Defendants Council, made the Caſe ſtronger againſt the Plaintiffs; for admit that the former way *Alexander* ſhould have had but a State determinable upon the continuance of his Iſſue-males, yet here not ſo; ſince the reaſon why in Wills, ſuch a Deviſe being made, the Law ſhould ſupply the words (*of his body*) is only to make an Eſtate-tail to the Iſſues male,

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according to the Teſtators intent. Now in this caſe of a Term for years ſo bequeathed, no Eſtate-tail could poſſibly be, though theſe words had been in the Will; and therefore the motive to the Law failing, no ſuch ſupply will be made by the Law, ſince it would be to no purpoſe: conſequently, here was neither State-tail, nor Iſſues or Heirs-males of the body, on whoſe continuance this State of *Alexander* ſhould be determinable. Therefore it was an abſolute and total Bequeſt of the Term to *Alexander* for ever, *viz.* ſo long as the Term ſhould continue; for as a Bequeſt to one for ever is as much as a Bequeſt to him and his Heirs; ſo a Bequeſt to one and his Heirs is as much as if it had been to him for ever.

And this Caſe, after ſix Argumens on each ſide at the Bar, (if I much mistake not) was upon argument by the Barons adjudged for the Defendant by the Lord Chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who only heard, as as I take it, one Argument on each ſide, made of purpoſe in reſpect of his coming into his place, after the former Arguments) being of the

the contrary Opinion: and the Judgment proceeded upon the Point formerly touched, that, as this Caſe was, the ſtate of *Alexander* did not end by his death, and remain to the Executors of *Ralph*. Other Points were ſtirred, which will be touched upon in other Diviſions after, in this Chapter. It will be obſerved that I do more fully expreſs reaſons and points enforced on the Defendants part than on the Plaintiffs, wherefore let theſe two reaſons be accepted. Firſt, that I better could relate that than the other, being the firſt who argued for the Defendant, and hearing little of that which was by others ſaid on either ſide after, nor hearing the Courts; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the Defendants part, to prove that this Caſe differeth from the Common Caſe of Deviſe to one for life, with Remainder to another.

We are now come to the ſixth Point, *viz.* that where Houſe or Land held by Leaſe, or the Profits thereof, or the Leaſe or Term it ſelf, which in a Will makes no difference, is bequeathed to *A* for life, or for ſome part of the Term, with the Remainder to *B*, and the Executor aſ-

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ſents that *A* ſhall enjoy his Bequeſt, whether this ſhall enure to *B* alſo, ſince without the Executors Aſſent no Legacy can take effect. And it hath been reſolved that this Aſſent ſhall be effectual as well to all the Remainders as to the firſt Eſtate: and ſo, according to former reſolutions, it was admitted in *Hamond*'s Caſe, that *Alexander* his Aſſent to take as Legatee ſufficed (if the Bequeſt had been good) for the Remainder to *Ralph* and others. And the reaſon of this doubtleſs is, becauſe here the particular Eſtate and the Remainder are all but one Eſtate in Law; they make but one degree in a Writ of Entry, nor ſhall have but one year and a day to enter for Mortmain. And an Attornment to the Grantee of a Rent or Reverſion for life with Remainder over doth enure alſo to the Remainder, which being Aſſent hath much affinity to that of the Executor, each tending to perfect the Grant of another Man. Now then, whereas it was urged in *Hamond*'s Caſe, that the State limited to *Ralph* ſhould take effect, not as a Remainder, but as a new Eſtate to commence futurely, *viz.* when *Alex.* ſhould be dead without Iſſue male: if it could be admitted to be ſo, then could

Plow. 545. 6 Co. lib. 10. f. 47.

not the Aſſent of the firſt State to *Alexander* have enured to this, ſince to *R* in Remainder it worketh as being one State with the firſt, which reaſon muſt fail the other way. This difference between a Remainder and new Eſtate future brings to my mind the Caſe of a Rent by way of new Creation, granted by *C* out of Land to *A* for life, or in tail, with Remainder to *B*. In like manner it hath probably been held, although this Limitation to *B* cannot be good by way of Remainder, becauſe *C* had no Eſtate in the Rent remaining with him when he made the Grant to *A*; yet ſhould it be good by way of a new Grant and Creation to commence futurely. But this doubtleſs cannot ſo be but with a difference. For if the Grant were by Indenture between *C* on the one part, and *A* only on the other part, now *B*, being no party to the Deed, can take nothing by it, except by way of Remainder, but if he were party to the Indenture; or if the Grant were by Deed-poll, to which all Men are alike parties, then it haply may enure as a future Grant to *B*, This is not impertinent.

Now as the Executors Aſſent to one cannot enure to another, though of the

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ſame thing, except by way of Remainder; ſo neither can it any way where the things are not the ſame, except in very ſpecial Caſes. As if a Termer bequeath a Rent to *A*, and the Land it ſelf to *B*, the Executors Aſſent that *A* ſhould have the Rent is no Aſſent that *B* ſhould have the Land: Yet I think the Aſſent that *B* ſhould have the Land doth imply the Aſſent that *A* ſhould have the Rent. 1. For that the Reſtraint impoſed by the Law againſt the paſſing of a Chattel by a Will without the Executors Aſſent being out of reſpect to the payment of the Teſtators Debts; now if the Land ſhall paſs to *B*, it is no more available to the Teſtators Debts that it paſs diſcharged of the Rent, than charged. 2. Since the Gift and Bequeſt was of the Land charged with the Rent, therefore if this Bequeſt ſhall take effect, it ſhall carry the Land according to the Teſtators intent, *viz.* with this Charge upon it: for what elſe doth the Executor in this, but aſſent that the Will of the Teſtator herein doth ſtand and take effect? and conſequently *B* muſt take the Term according to the Will, and not in any different or contrary manner.

Plow. *Com.* 521. in *Bret & Rigdens* Caſe. So of Common or other profit

Next we are to conſider of the manner of Aſſents by Executors, which hath ſome affinity with the fourth Point. But here we ſhall conſider only of Aſſents conditional. Now to this purpoſe we will caſt our eyes upon two ſorts of conditions, *viz.* precedent, and ſubſequent. As for the former, an Executor may to a Legatee abſolutely give Aſſent upon a Condition precedent, as thus: I am content, that if you can get and bring in to me ſuch a Bond wherein the Teſtator ſtood bound to *J S*, that then you enter upon the Term, or take the Corn or Cattel to you bequeathed. So of other like Conditions which may precede the Aſſent: as, If you can get the Aſſent of my Executor, or, If you will pay the Arrerages of Rent to the Leſſor behind at the Teſtators death, or, If you will pay the wages already due to the Servants attending about the Cattel or Corn to you bequeathed. In this caſe, if the Condition be not performed, there is no Aſſent, and therefore the conditioning in this manner is good. But if it be on a Condition ſubſequent as thus, I do agree that you ſhall have the thing bequeathed to you, provided that you ſhall pay ſo much yearly to me, or to ſuch a Creditor of the Teſta-

tor; now the Legatee entring into or taking the thing bequeathed, ſhall not loſe it again by failing to perform the Condition afterwards; for the Executor by his Aſſent cannot make that Legacy conditional which the Teſtator gave abſolutely, no more than he can make the Bequeſt to be abſolute which the Teſtator gave conditionally, except by a Releaſe made of the Condition. As in other things, ſo in this, the Executors Aſſent is like to the Attornment of a Leſſee, which cannot be upon a Condition ſubſequent, where the Grant is abſolute or without condition, though yet he may to his Attornment prefix a Condition precedent.

In the eighth place we are, touching the Bequeſt of Leaſes or Chattels real, to conſider what manner of Intereſt one to whom a Remainder of a Term after the death of another is limited hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is clear that he hath but a poſſibility of Remainder, for that poſſibly the whole Term may be ſpent in the life of the firſt, to whom during his or her life it is bequeathed: now a mere poſſibility is not grantable. Therefore was

9 *Eliz.* Fulſey's Caſe. it reſolved in the late Queens time, where he in Remainder granted or ſold his State or Intereſt to another during the time of the firſt, that this Grant was utterly void, becauſe a poſſibility cannot be granted. But whereas ſome opinion in that Caſe was delivered, that this Poſſibility could not be releaſed, no more than granted; it hath ſince been reſolved, that he in the Remainder, by his Deed of Grant or Releaſe of the Deviſee for life, may make his Eſtate, which before was determinable by his death, to be now abſolute, ſo as it ſhall continue to his Executors, Adminiſtrators and Aſſigns, after his death during the whole Term. It may be that what was conceived, in the ſaid Caſe of *Fulſey*, negatively of the validity of a Releaſe by him in the Remainder, might be meant, or perhaps expreſſed of a Releaſe to him in the Reverſion: but ſurely (methinks) though he could not ſurrender, yet his Releaſe or Defeaſance to him in Reverſion or Remainder, having the Free-hold or Inheritance, ſhould diſſolve or deſtroy this Term reſidue after the death of the Deviſee for life, ſo as there the Free-hold ſhould be diſcharged thereof. But *Quære,*

Lampets Caſe. Co. *l.* 10. *f.* 48.

re, for I have not known this in queſtion. As for the other Point of *Fulſey*'s Caſe, it was in the ſaid later Caſe of *Lampet* confirmed and admitted for good Law, *viz.* that this Poſſibility of Remainder cound not be aliened nor conveyed to a Stranger.

Now we are come to the ninth Point, *viz.* to examine whether any act of the Deviſee for life can fruſtrate or defeat him in the Remainder of the Term, and whether the act of God, *viz.* by the death of him in the Remainder before the firſt Deviſee for life, ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no Grant made by the firſt Man can cut off or defeat the ſecond, though formerly it were held otherwiſe: but according to the late Reſolution was it alſo held or admitted by all in the ſaid Caſe of *Hamond*, where was ſuch a Grant. And as this cannot be done by any direct Grant or Alienation, no more can it by an indirect or implyed, as by taking of a new Leaſe, which is a Surrender in Law of the old Leaſe, no more than by an expreſs Surrender; nor doubtleſs by Outlawry, whereby the Term of the firſt Deviſee is ſettled in the Crown. But

Plowd. 320. *Welchden & Elkington.* 10 *liz.* 1 y 277. 12 *liz.* 359 8 *El.* D 253. & 33 *H.* 8. Br. *Chattels* 23.

if we put the Caſe farther, of Waſt committed by the Tenant for life, or breach of Condition by not payment of the Rent, or otherwiſe; theſe for the whole in the later Caſe, and for the part waſted in the former, do ſo deſtroy the Leaſe, and put the Reverſion *in ſtatu quo prius*, as that all Remainders muſt needs fail: ſo of a Feoffment, or other like Forfeiture by Fine. As for the death of him in Remainder, it was urged in the Caſe of *Hamond*, that ſince it was but a meer Poſſibility, if it could not take effect, and become an Eſtate in the life of him to whom it was limited, it could not ſettle in his Executor: and to that purpoſe were cited the Caſe of the Rector of *Chedington*, and more expreſly as reſolved in the Point the Caſe of *Price* and *Atmore*. But the Court reſolved, (and found former Reſolutions in other Courts that way) that the death of him in Remainder did not hinder, but that it may ſettle as well in the Executors upon the death of the Deviſee, as it ſhould have done in himſelf, if he had over-lived the firſt Deviſee for life. If the Leſſor enter and levy a Fine, and the Deviſee for life enter not, nor claims in 5 years; he in the Remainder

Welckden & Elk. *ubi ſupra*. But there the Point was never queſtioned, though ſuch death was there.

der may enter, as having a Right futurely accrued.

In the laſt place we intermedled only with Leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken is to be extended to and underſtood of all other Chattels real, as Wardſhip of Body and Lands, Eſtates by Extent upon Statutes or Judgments, Terms otherwiſe than by Leaſe, in Fairs, Markets, Rents, Annuities, Commons, Advowſons, and other Profits; yea, one ſingle next Avoidance of a Church. Now we come to conſider of Bequeſts perſonal principally, if not only; *viz.* how ſuch may be forfeited, loſt, or revoked. Firſt, then, we will conſider of the acts of the Legatee; ſecondly, of the acts of God; Thirdly, of the acts of the Teſtator. The Legatee, as from the Civilians I learn, may forfeit his Legacy by his miſcarriage towards the Will: as if he uſe means to have it concealed and kept from being known, and conſequently proved. So if he excuſe it of Falſity. So, again, if he deface or deſtroy the Will. Alſo, if being by the Will appointed to be Tutor or Educator of a Child, he refuſeth ſo to be. So ſaith Maſter *Swinborn*: but *Sylveſter Prierius* ſeems

Of Forfeiture, Revocation and other loſs of Legacy.

Swinb. *de teſtam.* 352, 353. Except as Tutor or Guardian he excuſe it.

ſeems to me oppoſite in that where he
Sum. Sylv. 283. ſaith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non eſt conditionale, ſed modale*; ſo as he takes away the force of a Condition from words conditional, whereas the other without words conditional raiſeth a Condition implyed. Laſtly, if the Legatee preſume too far upon the ſtrength of the Bequeſt to him, ſo as he taketh the thing bequeathed without the conſent of the Executor, thus alſo doth he for-
De Teſtam. 252. feit his Legacy, ſaith Maſter *Swinborn*, unleſs the Teſtator did will and appoint he ſhould ſo do. The falling into enmity with the Teſtator will be conſidered of more fitly, as I take it, among the Acts of the Teſtater. In the next place, let us ſee what Acts of God ſhall cauſe a Legacy not to take effect. Firſt thus, If the Legatee die before the Teſtator, this Legacy is loſt, and his Execu-
De Teſtam. 355. tor ſhall not have it. So alſo, ſaith Maſter *Swinborn*, if it be appointed to be paid after the death of the Executor, and the Legatee dieth before the Executor, it is loſt. And ſo alſo if he die before the Condition performed, ſaith he. Let us come now to time of payment, and Death before

before it. If there be a day certain limited for payment, and the Legatee die before that day, his Executor ſhall have the Legacy; contrariwiſe, if the payment were limited to be made when the Legatee ſhould be married: but if it were only expreſſed to be towards the Marriage of the Legatee, and ſhe die before Marriage, her Executor ſhall have it, ſaith *Swinborn*. Now put the caſe that a Legacy is bequeathed to *B*, to be paid when he ſhall be five and twenty years old, and *B* dieth before that age; it ſhall now be paid to the Executor, and that preſently, without ſtaying till *B* ſhould have been of that age, ſaith *Prierius*. Nay, ſaith *Swinborn*, if the words of the Will be ſo, *viz.* when he ſhall come to ſuch an age, then if he die before, his Executors ſhall not have it at all: but if the Bequeſt be general, and farther it is added in the Will, that the Teſtator would have that Legacy paid the Legatee at ſuch an age, there, though he die before ſuch an age, yet his Executors ſhall have the ſum bequeathed. The difference may ſeem very nice, yet haply it wants not ſome probable colour of reaſon. Now laſtly, let us come to

Vide Bro. *Deviſe* 27. and 45. There were divers days of payment, and the Deviſee died before the laſt; his Executor ſhall have it 14 *vel* 24 H. 8 36 H.8. & 3 *El.* D. 59. See this difference.

Sum. Sylv. 283. According hereto *vide* Dy. *ubi ſupra*, *per majorem opinionem Juſticiar.*

Acts of the Teſtator.

to the Teſtators own acts, who clearly hath power to revoke or countermand any Legacy, though he revoke not the reſt of the Will. And here firſt of Revocation preſumed. If there fall out *graves inimicitiæ inter Legantem & Legatarium, Legatum caducum efficitur*, ſaith the Summiſt; *ſed non propter leves*, ſaith he: *& ſi graves, ſi tamen redeant ad amicitiam, redintegratur Legatum.* That is, by grievous Enmity after ariſing, and never reconciled between the Teſtator and Legatee, the Legacy is diſſolved; otherwiſe of a light breach or falling out, though it continue until the death of the Teſtator. This I conceive to be rather fit for this place, as an act of the Teſtator, than to be reckoned or regiſtred amongſt the Acts or Forfeitures of the Legatee; for that it is not by the Summiſt made material, or any point of difference, whether the Legatee gave juſt cauſe of offence, or that the Teſtator unjuſtly conceived diſpleaſure, and ſo grew into cauſſleſs enmity. Therefore alſo do I hold it of the nature of a Revocation implied or preſumed; for that although no Revocation be made, yet ſince the Teſtator hath ceaſed to bear good will to the Legatee, he cannot be intended to will him

Sum. Sylv. 285.

good,

good, nor conſequently to be of the ſame mind touching the benefiting of him, as he was when he made his Will. Yet here again it is worth the conſideration, whether the circumſtance following may not make a difference in the caſe, thus; That where the Teſtator dieth ſhortly after the breach and enmity grown, and before he come to the place where his Will is, or at leaſt to opportunity of peruſing and reforming the ſame, there this very alteration of affection ſhould make an alteration in the Will, and a Revocation of the amicable Bequeſt. But where he living a good ſpace after, and coming to the place where his Will was, and ſpecially if he do again peruſe it, he yet doth not croſs nor expunge that Bequeſt, here it may be preſumed that either his enmity ceaſed, or that ſo far as to continue this Bequeſt, the Charity or other motives inducing him to make it ſtood unvaniſhed and not extinguiſhed by this breach of former Amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and cauſing it to be atteſted by Witneſſes, though the Teſtator live divers years after,

after, doth ſtrongly argue his intent not to continue, that what was done in an extremity ſhould ſtand as his Will: ſo, on the contrary, the permitting of a Bequeſt expreſſed in a written Will to continue without any croſſing, blotting or defacing, may argue, againſt contrary preſumption, the Teſtators mind, that it ſhould continue as part of his Will. But now let us conſider of more expreſs Revocation, and to that purpoſe will I relate a late Decree in the *Chancery*, made by the Lord Keeper, according to the opinion of the Maſter of the Rolls, three Judges, and two Doctors, Maſters of the Court, between *Robert Eyre* and *William Eyre* Complainants, and *Heſter*, late Wife of *Chriſtopher Eyre* their Brother, and now Wife of Sir *Francis Wortley*, Defendant: Thus was the Caſe. The ſaid *Chriſtopher Eyre*, 15 *Jacobi*, by his laſt Will and Teſtament giveth and bequeatheth to the ſaid *Robert Eyre* his Brother an hundred pounds, and to the ſaid *William* his Brother a thouſand pounds, and gives to the ſaid *Heſter* his Wife all the reſidue of his Eſtate, and makes and ordains the ſaid *Heſter* his ſole and only Executrix, ſaving, for the

per-

performance of his Will, he orders *Robert Eyre* and *William Eyre*, his ſaid Brothers, and intreats them to joyn as Executors in truſt with his Wife, for the better performance of this his laſt Will. Afterwards, *Jan.* 5. 1624. being ſick of the Sickneſs, whereof he died, he was moved by Maſter *Damport* and Maſter *Stone* to ſettle his Eſtate: to which motion he yielded: and Maſter *Stone* and Maſter *Damport* did demand of the ſaid *Chriſtopher* what Friend he thought fitteſt to be his Executor, and to whom he would commit the care of diſcharging his Funeral, and performing his Will, whether he truſted any perſon more than his Wife to be his Executor. To whom he anſwered, That his Wife was the fitteſt perſon for that purpoſe, and therefore ſhould be his ſole Executrix. And then the Teſtator was moved by Maſter *Stone* to give and bequeath Legacies to his Father, to his Brethren, and to his Kindred: whereupon he anſwered, he would give or leave them nothing. And being farther put in mind to remember his Friends and others, gave and bequeathed to *Lionel Atwood*, his God-Child, twenty or thirty ſhillings. And being there-

thereupon moved by his Wife to give his ſaid God-Son more, or a greater Legacy, or the like in effect, he ſaid, Thou knoweſt not what thou doeſt, do not wrong thy ſelf; twenty ſhillings or thirty ſhillings is mony in a poor bodies Purſe, or the like in effect: and the reſt he left to his Wifes diſcretion or diſpoſition. And the ſaid Teſtator did ſpeak the words aforeſaid, or the like in effect, *Animo teſtandi & ultimam Voluntatem declarandi*, as the Witneſſes then preſent did conceive.

This Will was proved by the Oath of the ſaid *Heſter*, and this Codicil being pleaded as a Revocation of the ſaid Bequeſt, the ſaid Maſter of the Rolls, Judges and Doctors, were by the Lord Keeper and the Order of the Court deſired to reduce the matter upon the Will and Codicil into a Caſe, and to certifie their opinions, whether the ſaid Codicil were a Revocation of the Legacies given to the Plaintiffs, or not. And they, after Council heard at ſeveral times, *viz.* both Common Lawyers and Civilians, and many hours ſpent in conference together, did finally reſolve with one unanimous conſent, that the Legacies to the Plaintiffs

Ord. 27 Jun. a. 2 Caroli Regis.

given

given were not by the ſaid Codicil revoked, and ſo certified under their hands. Upon reading whereof *November* 25, Decree being reſolved to be made, if cauſe were not ſhewen to the contrary *Novemb.* 27; on which day the Defendants Council, before the Lord Keeper, in the preſence of the Maſter of the Rolls and the ſaid three Judges, and Sir *John Heyward*, alledging what they could in ſtay of the ſaid Decree; it was by a general concurrence of opinion decreed, that the Legacies given to the ſaid Plaintiffs ſhould be to them payed on our *Lady*-even, with twenty Nobles in the hundred for the detainment thereof.

This Caſe I thought fit to relate ſomewhat at large, becauſe it pitched upon the point of Revocation, without plain, full and expreſs terms. And ſurely, as Wills are to be made out of diſpoſing Memories and Underſtandings, ſo alſo with deliberate and adviſed Judgments; and therefore by like reaſon not to be countermanded or revoked by ſick or ſlight expreſſions. And this ſeems to me very agreeable with the rule and reaſon of the Common Law. For as Reaſon it ſelf doth dictate, that *Nihil tam conſentaneum eſt æ-*

quitati naturali, quam unumquodque diſſolvi eodem modo quo conficitur; ſo hath the Common Law of *England*, in my underſtanding, reſolved: as for the purpoſe, If the King preſent a Clerk to a Church, and he is thereupon admitted, and inſtituted thereunto; now yet before Induction may this be revoked as a Will may: yet if the King ſhall after, and before Induction, preſent another Man to this Church, without an expreſs Repeal or Countermand of the former Preſentation; it ſhall not hereby be revoked. So if Lands were conveyed to certain Uſes, with a clauſe or power of Revocation; the Sale of the ſame to another did not revoke the former: but if a State were meerly at will, then the Conveyance to another by the Common Law amounted to a Revocation. Therefore was the Statute made *tempore Henrici* 8. to redreſs this, *viz.* that where the King had granted Lands or other things to one during his pleaſure, this ſhould not be revoked by a Grant to another, without recital of the former, and Declaration that the King had determined his pleaſure.

To help this was the Stat. made 27 *El. cap.* 4.

6 *H.* 8 *cap.* 9.

Being now to conſider of Relation in the

the Executors Aſſent, it is meet, ſince theſe Diſcourſes are principally intended for thoſe who are not grounded Students in or Profeſſors of the Law, that we ſhew what we mean be Relation, or what it is in Law. Thus therefore be it conceived, that Relation is a kind of fiction in Law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time paſt. As for the purpoſe, *A* doth bargain, and ſell Freehold Lands to *B* in *Auguſt* by Indenture, which is not inrolled till *October* following; yet this hath ſuch relation to the Date of the Indenture, that if *A* after that, and before the Inrolment, become bound in a Statute, or granted a Rentcharge, or made a Leaſe for years, or took a Wife, or committed Felony, yet ſhall none of theſe be of any force to charge or prejudice the State of *B*, for that the Law adjudgeth him now owner by Relation as from the time of the Date: yea, if a Servant departing in *Auguſt*, for ſome great breach with his Maſter, do kill his Maſter in *October*, this is in Law Petty Treaſon, as if he had continued Servant when he did the fact; becauſe

it relates to the malice conceived when he was his Servant. Now then having ſhewed that a Term or other Chattel real or perſonal paſſeth not, nor is transferred in property to the Deviſee, until the Aſſent of the Executor be thereunto had; we now put the caſe that this Aſſent is not had till a year or ſome ſuch good ſpace after the Teſtators death, and make our Queſtion, whether this ſhall have Relation to the Teſtators death, *viz.* to be in the Laws account as if it had then been; or, perhaps, to ſome purpoſes ſo to ſtand, and to others not ſo? That this is uſeful and material to be known, be it thus ſhewed. One bequeathed his term of Tithes of an Advowſon of an Houſe or Land by him firſt leaſed to an Under-Tenant for Rent, and dieth in *May*, the Executor aſſenteth to the Bequeſt in *October*, between which two times Tithes be ſet out, the Church becometh void, Rent groweth payable; now if this Aſſent ſhall relate to the Teſtators death, the Deviſee ſhall have theſe, elſe not. The like Caſes may be put of the brood of Cows, Mares and Ewes, fallen between the death of the Teſtator and the Aſſent; ſo alſo of Fleeces of Sheep ſhorn, *&c.*

Now

Now to come to the Point, it is reported by the Lord *Coke* to have been held in the late Queens time, that this Aſſent ſhall, as between the Executor and the Legatee, have Relation to the Teſtators death, yet ſo that if the Executor before his Aſſent to the Deviſee of a Leaſe committed Waſt, now the Action of Waſt ſhall be brought againſt the Executor in the *Tenuit* for the Waſt done before, and not againſt the Deviſee in the *Tenet*.

Tr. 41 *Eliz.* *Co. l.* 5. *f.* 12. *B.* Sanders Caſe. *Vide* Plow. *Com.* of Treſpaſs againſt a Stranger for taking before Aſſent 280. b.

But put the caſe that the Legatee before the Executors Aſſent granted the term to *J S*, now if to any purpoſe this Aſſent ſhall have Relation, it ſhall certainly ſo be to make good this Grant, as making the Legatee to be eſtated, and conſequently able to grant before the Executors Aſſent: yet do I not find any opinion or reſolution in the Point, but find it debated at the Bar in the late Queens time between *Puckering* and *Egerton*, in the Caſe of Adminiſtration granted to *A*, after her Grant of a free Term left by her Intestate Husband; but I find no Reſolution therein, nor perhaps wants their material difference betwixt that Caſe and the other;

P. 25 *Eliz.*

for there the Deviſee had at leaſt an inception of Title by Gift of the Owner, wanting only a circumſtance of Aſſent to perfect it; but here this Woman till Adminiſtration had not ſo, unleſs, perhaps, the Statute 21 of King *Henry* the 8th, directing or enjoyning Ordinaries to grant Adminiſtration, ſhall amount to a kind of
48 E. 3. 15. Title *ad rem*, though not yet *in re*. But to return to the Point of *Aſſets*; Where a Reverſion is granted by Deed or Fine, if the Leſſee a good time after do attorn, this ſhall have no Relation to the time of the Grant; ſo as for Waſt committed or Rent grown due between the Grant and Attornment, the Grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the Gift of a Legatee, to have the Aſſent of the Executor before the Sale or Gift well teſtified; or if the Aſſent be not had till after, let him take a new Gift, that he may not reſt in a doubtful caſe: for beſides the Premiſſes, that great Legiſt Sir *Edward Coke*, when he was a practiſer (to Mr. *Stubbs* of *Norfolk*) for his Fee, gave his Opinion, as I have been confidently informed, that where a Leſſee for years being outlawed did grant his Term, and after reverſed the

the Outlawry, this did not make good the Grant by Relation, it not being in the Grantor at the time of his Grant. And this hath much affinity with the principal Point; for there, if the Relation help not, the Grant is not good from the Legatee.

Divers Caſes of Bequeſts conſidered and expounded.

IF a Termer of an Houſe bequeath his Houſe to *B*, without expreſſing how long he ſhould have it, he ſhall have the whole Term and number of years. So of Land. 14 *Eliz.* Dy. 307. *Cont.* in a Grant, 31 *Eliz.*

Alſo of the name of the Houſe, the Orchards, Gardens and Backſides do paſs: yea, if the Houſe with the Appurtenances be bequeathed, thereby the Lands belonging to the Houſe, or uſed with it, do paſs, though yet they would not ſo do by ſuch words in any Leaſe, Deed or Grant. Yet by ſome Civilians, or Canoniſts, the Orchard belonging to an Houſe ſhall not paſs by the only Gift of the Houſe, without ſome words ſhewing the intent of the Teſtator ſo to *Sum. Sylv.* 286.

be, or except one Gate or Door lead as well to the Orchard as to the Houſe: but ſome other of them hold, that it doth paſs without any ſuch help of circumſtance, ſo as it be adjoyning to the Houſe.

If a Leſſee for years give his Term by his Will to *A*, he ſhall have it without paying any Rent, for the Executors ſhall pay it for him, as I find in the Summiſt; but againſt Reaſon, methinks.

Ibid. ut ſup. If one bequeath his Indenture of Leaſe, his whole ſtate in that Leaſe paſſeth. So if one bequeath his Obligation or other Specialty, the Debt or Duty it ſelf ſhall go to the Legatee; and by the Canon or Civil Law the very Action it ſelf paſſeth, *Ibid. ut ſup.* *viz.* as I conceive, ability to ſue the Debtor in his own name: but in our Law it is otherwiſe, the Suit muſt be in the Executors name, for a Debt or thing in Action cannot be aſſigned, except by or to the King; and only at the Common Law is the Debt recoverable; but the Spiritual Court may force the Executor to ſue, or let his name be uſed in the Suit, for and by the Legatee.

Yet 48 E. 3. 12, 13. It is admitted, that ſuch a Deviſee of all Goods, after Debts payed, ſhall have a Duty reſting in account.

If one bequeath all his Moveables, Debts due to him are not bequeathed, nor Corn, nor Fruit growing on the ground,

ground, nor Stone, nor Timber prepared for Building, as the Canoniſts and Civilians hold.

On the other ſide, if one bequeath the moyety of all his Goods, the Legatee ſhall have only the moyety of that which remains after Debts payed; for that only is to be accounted the Teſtators which he hath *ultra æs alienum*.

By a Bequeſt of all Utenſils or Houſehold-ſtuff, Plate nor Jewels are not given. *Que.* 36 H. 8. Dy. 59. Dy. *ibid. Jupra, Sum. Sylv.* 286.

If one bequeath to his Wife all her Apparel, ſhe ſhall not have, as ſome Civilians ſay, her Ornaments of Gold or Silver; by which is meant, as I take it, Chains, Jewels, Bracelets, Rings, *&c.* But others are of contrary opinion, except they be ſuch things as are not lawful for her to wear.

If a Bed be given by a Will, *Venit ornamentum ejus*, ſaith the Civilian, that is, the Furniture thereof paſſeth, *viz.* not only the Bed, Bed-ſtead, Bed cloths, but alſo the Curtains and Vallants, as I take it. But I think that by gift of a Coach by Will, the Coach-Horſes paſs not; yet perhaps the Furniture of the Coach-Horſes may paſs as appurtenant to the Coach; for ſo I think they ſhall do, rather than by Bequeſt of the Coach-Horſes without the Coach. *Ibid.*

If

Ibid. If one bequeath to *A* Meat, Drink and Cloathing, or *Alimenta*; he ſhall have, ſaith the Civil Law, alſo Lodging, Habitation, and all things neceſſary for the maintenance of life, *viz.* as I take it, Fire and Waſhing, *&c.*

Ibid. b. If one bequeath to his Daughter ten pounds a year for her Apparelling, and ſhe demandeth none in four years; now ſhall ſhe not after that time have the Arrerages of this ten pounds by year for the time paſſed.

Ibid. If a Man bequeath one of his Horſes or Cows, not naming which, to *J S*, he is to chuſe which he will, ſo it be not the beſt of all, ſaith the Civil Law: and perhaps the mention of that exception grows out of reſpect to the Herriot, which the Lord ſhould have, or the Mortuary, which the Parſon ſhould have.

Ibid. A Man bequeathed thirty pieces of twenty ſhillings to *A*, twenty to *B*, and ten to *C*, to be had in ſuch a Cheſt or Casket, and it is found after his death that there be but thirty in all in that Caſket or Box; now each ſhall be abated ratably, ſaith my Summiſt, ſo as *A* ſhall have fifteen, *B* ten, and *C* five: and this ſtands with good Reaſon and Juſtice; for

ſo

ſo each hath a proportionable part. And it was reaſonable that it were by Parliament eſtabliſhed for Law, that all, both Legatees and Creditors, ſhould be payed in like proportion, where the State will not ſuffice for full payment of each, rather than that an Executor ſhould have power to pay one all, and another nothing: yet if the Teſtator left ſufficient to make good all thoſe ſixty pieces bequeathed, *Quære*, if that which is wanting in the Casket ſhall not be ſupplied and made up; for if the Caſes following found with the ſame Author be good Law, it ſhould ſeem ſo to be.

If one, ſaith he, bequeath to *J S* that which is another Mans, and whereto the Teſtator hath no right; then ought his Executor to buy it, and give it to the Legatee, or elſe ſatisfie him to the full value; and this, not only by the Civil, but alſo by the Canon Law, and *in foro Conſcientiæ*, ſaith my Author. *Sum. Sylv.* 286.

Again, If *A* bequeath to *B* ſuch an Horſe by name, and after ſell away that Horſe, and dieth; now is his Executor bound to anſwer the value thereof to *B*: and if the Teſtator, after his ſale of that Horſe, had bought another, and called him *Ibid.* 287.

him by the ſame name as the firſt; now ſhall this later Horſe paſs to *B*, ſaith the Book, except it can be proved that the Teſtator ſold the former Horſe of purpoſe to revoke his Will touching that Bequeſt.

Ibid. 286. So again I find, that if one having but a moyety or one half of green Cloſe, or of a Stack of Corn, or other Chattel, doth give the whole, ſo as the words be apparent to reach to more than his moyety, then muſt the Executors buy out the others part for the Legatee, or give him the value: but if the words be but general, ſo as they may be reaſonably ſatisfied with the Teſtators part, no ſupply ſhall be made. So alſo if one, having Goods in pledge, bequeath them, it ſhall be conſtrued to extend no farther than his right.

Ibid. 284. a. A Bequeſt is made of an hundred pound to be payed at a future time, *viz.* divers years after the Teſtators death; a Queſtion is made by the Summiſt, whether the profit of the Mony in the mean time ſhall go to the Legatee, or the Executor: and he reſolves with this difference, if the day were given in favour of the Legatee being an Infant who could not ſafely receive it any ſooner, then he ſhall have the profit; but if the reſpite of payment were

were in favour of the Executor, then ſhall the Legatee have but the bare ſum, without any addition of mean profits.

If one bequeath all his Term or Goods to his Executor for payment of his Debts, or Debts and Legacies, it is a void Bequeſt; becauſe it is no more than the Law would ſay, if he had ſaid nothing. So if it be generally to perform his Will.

15 *Eliz.* Dy. 331.

Plow. *Com.* 545. b.

Co. *lib.* 8. 96. a.

If one, ſeized in Fee-ſimple of Land, bequeath it to his Executor to pay Debts, the Executor hath no ſtate of Free-hold: for if he ſhould, then it muſt be either for life, which might end by his quick death before Debts payed; or in Fee-ſimple, which would carry away the Land for ever from the Heir, where perhaps a few years profits might ſuffice to ſatisfie the Debts; yea then by death of the Executor the Land ſhould deſcend to his Heir, and not go to his Executor, who would be Executor of the firſt Teſtator.

If one give or grant all his Goods, having Leaſes for years as well as Moveables, the Leaſes ſhall not paſs, as was held in the time of K. *Edward* the ſixth. And ſo alſo was it admitted in *Portman*'s Caſe. For the word *Bona* comprehendeth only Moveables, by the better opinion there. But

By deed or word in life 4 E. 6. Bro. Done, *&c.* 43 *Tr.* 37. *El. in B. R.* Portman *ver.* Simmes, or Willis, divers times argued.

But the Point in that caſe was pertinent to this place, *viz.* a Bequeſt in a Will of all the Teſtators Goods: and whether thereby a Leaſe for years paſſeth or not, was divers times debated, but not reſolved, the Judges differing in Opinion in that Point; but in another Point, which made an end of the Caſe, all agreed. Yet the better Opinion was, as I find in my Report, that a Leaſe would paſs by ſuch words in a Will, though not in a Deed or Grant by word otherwiſe made; for the Legacies are demandable in the Spiritual Court, where *Bona & Catalla* are taken for all one. See alſo the Statute of *Marlb.* giving an Action to the Succeſſor, *Ad repetenda bona prædeceſſ.* Yet an *Eject. cuſtod.* hath been maintained thereupon. So alſo upon the Statute of Executors, *De bonis aſportatis in vita Teſtatoris*, hath it been reſolved, and where Adminiſtration is granted, it is only *omnium Bonorum*, without ſpeaking of Chattels; yet hath the Adminiſtrator intereſt in Leaſes as well as Moveables. On the other ſide, the Statute *de Perog. reg.* mentioning only Forfeiture *de Catallis*, is clearly extended to moveables: ſo alſo in the Writ of Aſſize *De catallis quæ in eo capta fuerint*, and in the Writ of

Cap. 28.

4 E. 3. c. 7. So the Stat. 5 R. 2. of Forfeiture of goods by thoſe who go beyond the Sea, cap. 16. In all theſe Goods are comprehended.

of Execution upon a Statute there is only the word *Catalla*, and not *Bona*: and in the Case reported by *Kelway*, *tem. Henry* the 7th, it seems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that these Statutes and Writs were alledged or considered of, *temp. Edw. 6.* but in *Portmans* Case the most of them were.

13 H. 7. Kelvv. Rep. 35. a.

If one will that his Wife, or any other, shall have, or hold, or enjoy the moyety of his Lease with his Executor, this implieth not that the Executor have the other moyety as a Legacy also, but otherwise as the Law casts it upon him; no more than where the moyety of Fee-simple Land is devised to the younger Son, this shall not make the elder Son to have the other moyety otherwise than by descent, as between *Low* and *Carter* was conceived. But there being a Proviso in the Wifes Bequest, that if she married from the House, then, *&c.* *Popham*, Ch. Justice, held, that if she married at all, this was a marrying from the House; for she was no longer Widow of that House, though she married with one of that Kindred, and who had no other House, but would dwell in the bequeathed.

Low & Carters Case, *Tr. 37 El. in Ban. Reg.*

CHAP.

CHAP. XX.

Of the Executor of an Executor.

I Should be taxed of omiſſion, if I ſhould not ſhew whether the things foreſpoken of Executors immediate extend alſo to the mediate or more remote Executors. Aſſuredly, were I not by the Books otherwiſe informed, I ſhould think it ſomewhat ſtrange that the mediate Executor in the fourth, fifth or farther degree, ſhould not by the Rules of the Common Law, ſtand in like plight Executor to the firſt Teſtator, as the firſt and immediate Executor; as well as the Heir and Aſſignee in the third or thirteenth degree is capable of all advantages in like ſort as the firſt and immediate Heir and Aſſignee. And indeed, we find both in the time of *Edward* the ſecond and *Edward* the third Execution ſued out upon a Judgment and Statute by an Executor of an Executor; and why he might not as well maintain an Action of Debt, *&c.* I ſee not. But I muſt

See *Plow.* 184. a Debt againſt the Executor of an Executor

19 *Ed.* 2. *&* 14 *Ed.* 3. *Fitz. Executor* 87 *&* 103.

I must confess, I find both Books to the contrary before any Statute made in the point, and after an Act of Parliament to enable them to bring Actions, and to make them subject to Actions; yet the Statute speaks nothing of conferring upon them the Testators Goods. Now if they had title to them before that Statute, and without the help of that Statute, it is strange if they should not be suable for Debts. But since that Statute, and at this day, where by a Will a special Trust is recommended to an Executor, as to sell Land, *&c.* this not performed in his life-time shall not be performable by his Executor: contrariwise of an Interest, as to take the Profits of Lands for certain years towards payment of Debts and Legacies. And where the Statute *temp. H.* 8. gives remedy to Executors for recovery of Rents of Inheritance behind in the Testators life, I doubt not but Executors of Executors are within the equity, as well as within the Statute 9 *Ed.* 3. *cap.* 3. that the Executor who appears at the grand Distress shall answer alone. Yet the Statute *West.*2. *cap.* 23. for Executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all cases,

11 *Ed.*5. & 13 *Ed.* 3. Fitz. *Ex.* 78. 25 *Ed.*3 *c.*5.

19 H.8.9,10. 4 *El.* Dy.201 32 H.8. *cap.* 37. So 32 *H.* 8.28 Leases. And 32 H.8. *cap.*33. Condition. And 13 *El. cap.*5. & 27 *El. ca.* 4. of fraudulent Conveyances. 21 *H.*8. *cap.* 15. for falsifying Recoveries. 39 *H.*6. 45. 7 *E.* 3. 62.

except of ſpecial truſt or authority without the Office of Executorſhip, the Executor of an Executor, how far ſoever in degree remote, ſtands as to the points both of Being, Having and Doing, in the ſame ſtate and plight as the firſt and immediate Executor.

CHAP. XXI.

Touching Adminiſtrators.

OF theſe alſo, as ſtanding in much affinity with Executors it may be by ſome expected that I ſhould have treated. But firſt, my excuſe is, that theſe of Executors only having grown to ſo great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of Having and Doing is before ſet forth and ſhewed touching Executors, may be applied to and underſtood of Adminiſtrators; though not what is ſpoken of Being and Unbeing, or Revocation of Executorſhips, and other circumſtantial points.

Laſtly, I may perhaps, if theſe find good acceptance, add ere long that which ap-

appertaineth to Adminiſtrators diſtinguiſhed from Executors, or wherein they ſtand in different ſtate.

CHAP. XXII.

Conſiderations in Conſcience touching payment of Debts, Legacies, and the preferring or reſpect of perſons.

TO the Advertiſement, what courſe Executors are to hold in their payments, I thought good to add this *in foro Conſcientiæ*; That when as it ſhall ſtand in the Executors Will and Election to pay whom he will, and as he will in reſpect of equality in the dignity and degree of the Debts, all being for the purpoſe by the Specialty, and none of Record, and yet he hath not wherewith to pay or ſatisfie all, here he may have three ways or courſes in his eye.

First, where there is equality in the Honeſty and Conſcience of the Debts, there (except in the ability of the parties to bear loſs the diſproportion may otherwiſe occaſion) methinks it ſhould be moſt honeſt and juſt to pay every one proportio- 1.

nably, and to let the loſs of every one to be equal. And the juſtneſs of this is taught by the Law, which gives the *Audita querela* for equal contribution in bearing of loſs by them who ſtand in equal degree: ſo of Legacies.

2. The property and inability of ſome, and the plenty of others, may *in foro Conſcientiæ* juſtifie the paying more to one, and ſuffering him to loſe leſs, (if any thing) than another. For if the Widows Mite was a greater gift, ſo a greater loſs than more out of abundance. Where Charity finds or may find place or nearneſs to place of giving, it may find greater motives of preſerving from loſs: ſo of Legacies.

3. The nature of the Debts, and ſo ſometimes of Legacies, may be ſo different, as thence may ſpring a juſt motive to diſproportion payments, to pay more to one than another, rate for rate, and ſo to ſuffer one to loſe more than another. One Debt may perhaps be uſe for mony, or at leaſt mony lent for Uſe; another may be mony freely lent; another Debt for Land of Inheritance bought; another Debt for a Leaſe, Chattels or Moveables, come to the Executor. The firſt merits the leaſt reſpect, next the ſecond, then the third,

and

and the laſt the moſt. But where without any of theſe motives there is not equality held in the payment, *peccatur* (as I think) *in Conſcientiam.* But let every one ſtand or fall by or to his own, or to him who is greater than his Conſcience. This equality Saint *Paul* in another caſe recommends to the *Corinthians.* And *Solomon*, whilſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equal diviſion of the Child between the Mothers, who were joynt Claimers and Competitors for it. 2 *Cor.* 8. 14.

See more of Conſcience, *Doct.* and *Stud.*

FINIS.

FINIS

AN APPENIDX TO THE OFFICE and DUTY OF AN EXECUTOR: WHEREIN

Are contained the Natures of Teſtaments, Executors, Legataries general, and divers other Material things relating to the ſame; Briefly Methodized for the Uſe of all Perſons concerned.

By *THOMAS MANLEY* of the *Middle Temple* Eſquire.

LONDON,
Printed by the Aſſigns of *Richard* and *Edward Atkins* Eſquires. 1688.

AN APPENIDX TO THE OFFICE and DUTY OF AN EXECUTOR WHEREIN

Are contained the Natures of Testaments, Executors, Legatories general, and divers other Material things relating to the same; Briefly Methodized for the Use of all Persons concerned.

By THOMAS HAVLET of the Middle Temple Esquire.

LONDON,

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TO THE
READER.

THis little Eſſay which is here added by way of Appendix to the Office and Duty of an Executor, contains in it many things which have not yet been Common, either for Method or Uſe: For firſt you have the things defined, and then the Uſe of them, with apt Caſes in Law thereunto applied: It alſo ſhews what a Teſtament is, who are capable to make one, and what things may paſs thereby; what things may paſs

by

by Will; *of* Lands, Goods *and* Chattels; *of the* Tuition *of* Children, *to whom*; *the Forms of* Teſtaments; *what Perſons may be capable of Executorſhip, or Legacies*; *the kinds of Executors*; *whether better to accept or refuſe* Executorſhip; *of* Mortuaries, *of* Accounts, *how* Teſtaments *become* void, Ademption *of* Legacies, &c. *wherein alſo are introduced ſome Obſervations on the* New Law *of* Adminiſtrations, *and diſtribution of* Reſiduums *by the Statute made the* 22. *year of His Majeſtie's Reign, by all which if thou receiveſt benefit is the end deſired by*

T. M.

AN

AN APPENDIX TO THE OFFICE and DUTY OF AN EXECUTOR.

A Teſtament differs from a laſt Will in the naming an Executor, and it is thus defined. *Teſtamentum eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri voluit.* Teſtament.

If one demand of *B* who ſhall be his Executor, and he name *D*; or if *B* ſay, I mean to make *D* my Executor, yet *D* is not Executor, unleſs it be probable that *B* had at that time *animum teſtandi.*

A

A is compelled by fear or menace, or urged by Violence to make his Will, this is void, yet a modeſt requeſt to one to make his Will, is allowable.

If any perſon refer his Will to another to declare and name an Executor for him, and he do it, this is void.

Codicil. A Codicil is like a Boat tied to a great Ship: there is no Executor named therein, it may be written or nuncupative; made before or after the Teſtament, or by one dying Inteſtate, and perhaps long before his death, and yet it may be good; for being made before a Teſtament, it will be good, unleſs it be revoked by a Teſtament, or be contrary to it.

If two Teſtaments be found, and no knowledge which was made firſt, and they differ both in matter and circumſtance, both ſhall be void; not ſo of a Codicil unleſs the one impugn the other.

Legacy. Things given and delivered by a Teſtator in his life time, are no Legacies.

A named *B* his Executor, who cannot or will not intermeddle; Adminiſtration muſt be granted by *Statute cum teſtamento annexo*, which makes the Legacies thereby given due both by Law and the

the cuſtom of *England*. But the Civil Law holds the contrary to this.

A bequeaths Corn growing or Goods unto one: A Stranger will not ſuffer the Executor to perform the Will, he ſhall ſue him in the Spiritual Court. *Contra* if a Stranger take the Teſtators Goods from the Executor, there he may have an Action of Treſpaſs at the Common Law.

A Teſtament dated at *Cane* in *Normandy*, and proved afterwards in *England* is good. Legacies are to be recovered in Court Chriſtian, ſo if a Termor deviſe his Crop or Goods: But of Franktenement or Inheritance, the Legatee may enter without farther Aſſignment.

A bequeaths Goods to repair the Fabrick of a Church, if they be detained they muſt be recovered in the Eccleſiaſtical Court, ſo muſt a Wardſhip and Chattels real when bequeathed, be recovered.

A charges his Executor to pay his Debts, the Creditor in reſpect of this charge may ſue in the Eccleſiaſtical Court. So if an Executor be charged to build a Grammar School, and he neglect it.

Among the Ancient *Romans* there was

Solemn Teſtament. a Will, called a *Solemn Teſtament*, which was proved by ſeven Witneſſes, and all their Seals affixed to it, or elſe it was deemed void; but now two ſufficient and credible Witneſſes ſuffice.

In a Deviſee of Lands it muſt be in the life time of the Teſtator and in writing. But of Land deviſable before the Statute, the Teſtament is good if it be probable.

One dying Inteſtate, the Widow or next of Kin ſhall have Adminiſtration: See the *Stat.* 21 *H.* 8. 5. but ſee alſo 31 *E.* 3. 11. but theſe are both altered by the late Statute made in his now Majeſtie's Reign.

Teſtaments written by others being read and allowed before the Teſtator are good, or if a Notary take brief Notes and write them in form at large, and the Teſtator die before he hear it read, yet it is good to paſs Lands and Tenements.

Lands will not paſs by a Nuncupative Will by the *Stat.* 32 *H.* 8. yet in Burgage tenure it may be the contrary.

A Teſtator writeth his Will with his own hand, or cauſeth it to be written in his preſence, and after ſhews it to witneſſes, and then ſealing it up, ſays, This

is

is my laſt Will; this will be a good Teſtament; but it is neceſſary ſuch witneſſes write their names on the backſide.

A Teſtator ſays ſuch a one naming *B*, hath his Will in keeping, and after dies, *B* produceth a Will and is ſworn to it, yet he muſt prove it at leaſt *communi forma*, or if put to it *per Teſtes*, who can prove the hand and other circumſtances.

Teſtaments Priviledged

Beſides them there are Military or Priviledged Teſtaments, and thoſe of three ſorts. 1. Among Souldiers, they may have two and both good according to meaning. Theſe Souldiers were anciently divided into three Kinds: 1. *Milites armati*, 2. *Milites Literarij*, 3. *Milites cæleſtes*, that the *Milites armati*, the active Souldiers had this priviledge is not to be doubted: but the 2. *Milites literarij* who were Doctors of the Law, and the 3. *Milites cæleſtes*, who were Divines were but metaphorical Souldiers, and it hath been a continued doubt whether they ought to have this Priviledge.

The ſecond ſort of Priviledged Teſtaments is called *Teſtamentum in Liberos*, and in ſuch caſe where two Teſtaments are found, and the firſt is to the uſe of Children, this will not eaſily be avoided by

by a later Will giving Goods to ſtrangers, unleſs in the later there be a ſpecial revocation, or elſe it be made *in pios uſus*, or upon ſome great diſagreement, that had of late happened between the Father and Children. But if two be found of one date, and the one favours Children, and the other hath a contrary face or deſign, that that favours the Children, ſhall have the more favourable allowance, becauſe it carries the Eſtate to the blood, which the Law is very tender of.

The third ſort of Priviledged Wills is *Ad Pias cauſas*, whereby a Legacy being given to young Orphans, Widows, lame, diſeaſed, poor, needy and miſerable perſons, or to Hoſpitals, Churches, repairing Bridges, City-walls, *&c.* Theſe priviledged Teſtaments may be written with any Characters, Figures, Language, *&c.*

A Teſtament *ad pios uſus* found cancelled, unleſs there be a poſitive proof of cancelling the ſame, ſhall be preſumed to be done unadviſedly, and ſo conſequently good.

Two Teſtaments are found: 1. *Inter Liberos*, 2. *Ad pios uſus*, both of one date,

date, of theſe the firſt ſhall be judged good, becauſe the Children have a firſt right, *& jure ſucceſſionis* ſhall be admitted.

CHAP. II.

What Perſons may make a Teſtament.

NOne under twenty one years of Age may deviſe Lands, Tenements, or other Hereditaments: But of Goods a Boy at fourteen, and a Girl at twelve may diſpoſe, but not before. though *ad pios uſus*: nay in truth it is voidable being ſo made in Minority, unleſs (if when they come to full Age) it be confirmed, for then it will be good. Children.

Mad and Lunatick perſons cannot diſpoſe of any thing during their Madneſs and Lunacy, though *ad pios uſus*: but if they have *lucida intervalla*, it is held otherwiſe. Mad and Lunatick.

A being *compos mentis*, makes his Will, after he becomes *non compos*, and during that incapacity would diſannul it, this will not avoid it, for the firſt Will ſtands good. And here note, that every Man

and Woman is ſuppoſed to be of ſound and perfect mind and memory, unleſs poſitive proof be made to the contrary. Words only are not a ſufficient proof of ſanity of mind or to ſet forth the reaſonable faculty. For a Parrot may be taught ſignificant words, yet none will aver them to proceed from an inſtinct of reaſon, no more than they can aſſert *Balaams* Aſs a reaſonable Creature, becauſe by miracle its mouth was opened to reaſon with its Maſter.

Old Men. An old Man, who is ſo ſuperannuated that he has forgot his own name, is held unfit to make a Will. So a Man *in extremis.*

Villains. The old Law of Slaves and Villains, was this; their Lands, Goods and Children gotten by themſelves, or given them by others, were all in bondage. For whatever ſuch a Bondſlave getteth, it is his Lords; for if a Villain make a Will of his Lands, or Tenements, or Goods, and the Lord enter before the Will proved; the Will ſhall be void, and the Lord ſhall have them. But this Law is (though not abrogated) yet ſo long diſuſed, that it is of no force.

Priſoners. If a Man be condemned to perpetual im-

impriſonment upon a criminal account he cannot make a Will: But a Priſoner for Debt may, ſo it be not to defraud his Creditors.

A Woman Covert cannot deviſe Lands, Tenements, or Hereditaments, neither to her Husband or any other; 1. Not to her Husband for theſe reaſons. 1. For that may be in prejudice of the Heir. 2. Albeit ſhe did of free will, and without conſtraint, for the tie is not apparently taken off. 3. Although the Will were made before Marriage, for the Teſtator muſt be in as good power at the time of death as of the making the Will. 4. If the Wife make a Will during Coverture, and then ſurvive her Husband, this is ſuppoſed void, unleſs ſhe confirm it after the Husbands death; But if ſuch Will were made before Marriage by her, and ſhe ſurvive, that will be good. Feme Covert.

She may not deviſe Goods and Chattels without conſent of her Husband, but by his licence peradventure ſhe may.

In ſome few caſes a Feme Covert may make a Will without her Husbands licence, as firſt an Empreſs or Queen, ſo

it be not in prejudice of her Husband or his Regality. 2. When any thing is due to the Wife whereof ſhe was never poſſeſſed during the Coverture; neither may the Husband bequeath a choſe in Action, as an Obligation, *&c.* which he hath only in the right of his Wife, if he be not joyned with her, or the property altered after Marriage. 3. A Woman betrothed to a Man, may before eſpouſals make a Will. 4. If a Wife be Executrix to another, ſhe may diſpoſe of thoſe Goods, elſe might the next of Kin have Adminiſtration *de bonis non adminiſtratis* of her Teſtator, for where an Executor dies Inteſtate, the Teſtator from that time is deemed to die Inteſtate.

A Wife may appoint her Husband her Executor, but ſuch Wife is reſtrained from making ſuch a Will two ways, 1. Unleſs ſhe appoint an Executor, her Will will be void. 2. If ſuch Wife have any Goods as Legatary from the Teſtator, and which ſhe receiveth as Legatary, not as Executor, they are her Husbands, and ſo not by her deviſable: alſo increaſe of Goods during the Coverture which the Wife has as Executrix, as Calves, Lambs, and the like, the ſame redound to the Husband and not to her.

A Wife or other Executor and Legatary is deemed to accept Goods as Legatary, not as Executor, unleſs by Proteſtation or ſome other means, the contrary appear, for it is her better Title and more free; yet this is according to the rule of the Civil Law, but not agreeable to the Law of the Land.

If a Husband be bound, or do voluntarily licence the Wife to make her Will before Marriage, and ſhe make two or three, the laſt is that muſt ſtand.

A deaf and dumb perſon, not knowing what a Teſtament is, cannot make a Teſtament, but if he were not deaf, *a partu & naturaliter*, but he became afterwards deaf and dumb by accident, or otherwiſe, he may do it by ſigns, but it will be better if he can write. He that can ſpeak could once hear, *Ergo*, he may make a Will. Deaf and Dumb.

Dumb and not deaf, may make a Will by ſigns, ſo as the ſame be well known to witneſſes.

A blind Man, may make a Nuncupative Will, or a Teſtament in writing, if it be read to him, and he declare he heard and underſtood it. Blind.

A perſon convicted of High Treaſon, Traitor.

cannot make a Will, for that he hath forfeited all his Eſtate both real and perſonal whatſoever. But if he obtain a Pardon, *Quære*, what he may do.

Felons. Felons forfeit their lives, Goods and Chattels, and the profit of their Lands for a Year, Day and Waſte: and after the King hath had *annum, diem & vaſtum*, the chief Lord of the Fee ſhall have it, except in the County of *Glouceſter*, where the next Heir after the Year and Day ſhall inherit; and in Gavel-kind Lands where they deſcend equally to Sons, and for default of Sons to Daughters in like manner: And there it is ſaid, *The Father to the Bough, The Son to the Plough.* So that Felons cannot make Teſtaments of what the Law hath made a prior diſpoſition. But if a Man be indicted of Felony, and die before conviction, he may deviſe his Goods and Lands, or if upon his arraignment he ſtand mute, his Goods ſhall be confiſcated, but he may deviſe his Lands.

For a Felon attainted at the time of the Fact committed, in ſuch caſe it is to be regarded in reſpect of his Lands: but for his Goods, the time of Judgment muſt be reſpected; for before

Judg-

Judgment he may give his Goods, for neither the Sheriff nor other perſon can ſeize before conviction.

An Heretick doth not forfeit his Lands unleſs he be executed, nor Goods unleſs he be convicted and delivered over to Laymens hands; yet if he be but excommunicate, he cannot make a Will. Heretick.

Apoſtatas are of three ſorts. 1. Such who having once been Chriſtians renegue their profeſſion, and become *Jews* or *Turks*; and ſuch an Apoſtate was *Julian* the Emperor, who from thence had the infamous Sirname of, *The Apoſtate*: 2. Such as being ſubject, refuſe to obey the command of the Ordinary or Superiour, as our now *Sectaries* and *Nonconformiſts*. 3. Such as have entred into Holy Orders, and afterwards throw it off, and become lay in habit or profeſſion, and theſe are all reputed as bad, if not worſe than Hereticks. Apoſtate.

A *Sodomite*, *qui peccat inter maſculos & contra naturam cum fœmina*, is barred to make a Will, although he be not convicted. Sodomite.

An Outlawed Perſon is out of the protection of the Law, and all his Goods and Chattels are forfeited, be the cauſe of Outlaw.

Action juſt or unjuſt, *Doct. and Stud. Lib. 1. Cap. 6.* in fine, if one be outlawed for Felony he ſhall forfeit Goods and Lands, but in Action perſonal the contrary, if any Error or diſcontinuance be in the Suit or Proceſs whereby the Outlawry becomes reverſable, as where the party is beyond the Seas; where three proclamations are not made, whereof one in open Court, another at Quarter-Seſſions, and a third at the Church or Chappel-door where the Defendant dwelleth; or laſtly, where the party hath obtained his Pardon.

In extreams. One at the very point of death, if he be of good memory, though you can ſcarce underſtand what he ſpeaks, yet may make his Will, and it ſhall be good.

A written Will is brought to a ſick Man, and he is asked if that be his Will, and he anſwers yea; this Will if it were written by the ſick Mans privity, or directions, it will be good; otherwiſe it is held contrary.

Religous. Eccleſiaſtical perſons are either Regular or Secular; The Regular are Monks, Friers, *&c.* And if ſuch a Regular Clerk make his Will at his entrance into Religion, it muſt be then alſo ptoved, and the

Exe-

Executor muſt enter as if he were actually dead; for he is accounted dead in Law, in reſpect of his Vow, and therefore totally diſabled to make a Will afterwards. The Secular are Biſhops, Vicars, *&c.* and theſe may make a Will, ſo as the Goods they diſpoſe thereby be not held by them in right of their Church: for they may not deviſe the Fruit of Trees growing on the Glebe. Howbeit Corn growing upon the Glebe belongs to him, his Executor or Adminiſtrator, but of other Fruits, Tithes, Oblations and Emoluments, the next Incumbent ſhall have them towards payment of the Firſt-fruits: and if he die his Executor, 28 *H.* 8. 11.

CHAP.

CHAP. III.

What things may paſs by Will, and how much. 1. *Of Lands.* 2. *Of Goods, and Chattels: And of the Tuition of Children, to whom, and how it ſhall be granted or committed.*

LAnds are deviſable, either by Cuſtom or by Statute. By Cuſtom, ſuch are Gavel-kind Lands, (which are not confined only to *Kent*, as hath been erroneouſly held from the Grant of *William* the Conqueror.) And one ſeized thereof may give or ſell them at his own pleaſure: neither are they forfeitable for Felony, according to the Adage, *The Father to the Bough, The Son to the Plough.* 2. Lands held in Burgage-tenure by Cuſtom deviſable in divers Cities and Burroughs. And ſuch Land may be given in Fee-ſimple, Fee-tail, for Life or Years, ſo as the Will be enrolled before the Mayor, neither is it needful to have it written according to the form of the Statute of *Hen.* 8. for that the Land was deviſable

deviſable before that Statute, and is a kind of a Socage-tenure.

Citizens, Burgeſſes and Free-Men may deviſe their Lands in Mortmain, which others who have Burgage Lands may not do, otherwiſe there is no difference. But Joyntenant of Burgage-Lands cannot deviſe his part, for it will paſs by ſurvivourſhip.

The Cuſtom of deviſing Lands to Feoffees reformed by 27 *H.* 8. which ſee at large. As alſo the *Stat.* 32 *H.* 8. whereby Lands may be deviſed.

A having Lands in Socage may deviſe all, except he have Lands of the King or others in Knight-Service, but in ſuch device there muſt be reſerved *primer ſeiſin*, and fines for alienations, ſuch as ſhould have been, in caſe the Land had been altered or ſold.

If one hold Lands in Socage, and other Lands in Knight-Service, he may deviſe all his Socage Lands, and two parts of thoſe in Knight-Service, reſerving three parts for the King or other Lords of the Knight-Service Lands for Wardſhip and *primer ſeiſin*, *&c.* but this is in effect now out of doors.

If there be two Joyntenants or more of Land

Land holden of the King, and one die, his Heir ſhall be in Wardſhip.

Lands, Tenements, Rents and other Hereditaments in poſſeſſion, reverſion or remainder may be deviſed as before.

Of Goods and Chattels all may be deviſed, yea as well things extant as things not in being at the time of the device, or during the Teſtators Life, as Corn annually growing in ſuch Land; all Lambs coming of ſuch a Flock, depaſturing in ſuch a Field next Year; but if no ſuch Corn or Lambs be; it is void.

By Common Law; If *A* grant *B* an annuity of 10 *l.* to be taken out of his Coffers, and he have no Coffer, or out of his Lands in Dale, and he have none there: in both theſe caſes his perſon is chargeable.

By a Deed of Gift made of all Goods, and Chattels, yet Debts or things in Action paſs not: Contrary it is of a deviſe by a Will; for if a Debt or thing in Action be given to *A* the Teſtator may make him Executor only to that, and *A* may recover it in his own name.

If a Man bequeath another Mans Goods, by the Civil Law, the Heir muſt either buy them, or render ſo much in value

value to the Legatary. But both by the Common Law, and Law Eccleſiaſtical uſed in this Realm, ſuch a deviſe is judged void.

There are ſeveral ſorts of Goods which are ſaid not to be deviſable, as 1. Such as a Man hath in the right of his Wife, *viz.* Debts due to her, or things in Action, or Chattels real, as Leaſes, for after the Husbands death, they return to the Wife. 2. One may not deviſe Goods which he has joyntly with another, no though he make the other joynt Executor, yet he ſhall not be chargeable for thoſe Goods, but adjudged to have them as ſurvivour. 3. Neither may one bequeath thoſe things which he hath, as Adminiſtrator to another, for he ought not to convert thoſe to his own uſe, but therewith to pay the Debts and Legacies of the Deceaſed, and to diſtribute the reſt in *pios uſus*, and therefore bound to be accountable. 4. Albeit, the Executor of an Executor may adminiſter Goods of the firſt Teſtator, yet ſo may not the Executor of an Adminiſtrator, but there muſt be a particular Adminiſtration of them granted: Alſo an Executor may appoint an Executor

cutor of the firſt Teſtators Goods, ſo may not an Adminſtrator. Howbeit, an Executor cannot give away the Goods of a Teſtator, no more than may an Adminiſtrator, for they are not properly his, but he muſt accompt for them. 5. Goods of the Realm, ſuch are the Crown and the Jewels thereof, are not deviſable. 6. The Maſter of a Colledge, the Mayor of a City or Burrough may not deviſe things which belong to the Burrough, City, or Colledge; ſo it is alſo of an Hoſpital and Church Goods; (excepting upon the Glebe growing.) 7. Goods *de jure*, belonging to the Heir are not deviſable, as Trees growing, the Heir-loom, *&c.*

Tenant in right of his Wife, ſows Lands, and bequeaths the Corn, the Legatary ſhall have it, and not the Wife, otherwiſe it is of Corn and Graſs not ſeparated.

Tenant in Tail makes a Leaſe for Life to *A* and dies, the Iſſue in Tail recovers Land againſt *A* being ſecond in *formedon*, this is loſt.

A hath a Daughter and dies, his Wife great with Child of a Son; the Daughter enters and ſows the Land, ſhe

ſhe ſhall reap, though the Son be born before reaping time; But if after the ſowing of Corn and before the Son born, the Mother recover Dower againſt the Daughter, and the ground ſown be aſſigned to her in Dower, ſhe ſhall alſo have the Corn.

Windows, Tables, Wainſcoit, Benches, and the like, fixed or mortiſed in earth go not to the Executor, but to the Heir, for they are parcel of the Free-hold and to remove them is waſt; Alſo Furnaces and Ovens, ſet in Mortar or Stone do belong to the Heir. Windows, &c.

Concerning the aſſigning of Tutors or Guardians, and the diſpoſing of Childrens portions during minority. Divers Cuſtoms are in *England* obſerved. Guardians.

A Father hath a paternal power and may appoint a Tutor or Guardian to his Child for a time, and the cuſtody of his portion.

All but the Heir and ſuch as are preferred in the life time of the Parents are to have filial portions of the Fathers Goods: But if there be no Teſtamentary, Tutor or Guardian, then the Ordinary may appoint the next of Kin, demanding the ſame, as in caſe of Adminiſtration, but

but if the Child be a Ward, the Ordinary may not do it. Neither can any one be a Tutor or Guardian, who may not be an Executor.

A Tutor or Guardian may be aſſigned to a Boy till 14, to a Female Child till 12, and then they may have Curators of their own chooſing.

If a Child be a Ward, the Guardian ſhall have him, and all his Lands, and offering him a convenient Marriage and at reaſonable age, if they refuſe, he ſhall have the value of their Marriage, which ſhall be rated according to the value of the Land: but this is now taken away.

But in Socage Tenure, if the Land come by the Mother, the Uncle on the Fathers ſide, ſhall have the Guardianſhip, *& ſic e contra*, and as ſuch ſhall account to the Pupil for the profits of his Land at his full age.

Of Fools and Ideots, the King by his Prerogative Royal, hath the tuition of the Body, and the profits of the Lands; but after the Ideots death, the Land ſhall return to the next Heir.

Copy-holder Heir under 14 years of Age, ſhall have a Guardian appointed him

him till 14 as the Mother, or next of Kin.

A Tutor may be appointed for a time, either ſimply, or upon condition, nay more than one may be appointed.

If the Teſtator ſay, I commit my Children to the tuition of *A*, or I leave them to his hands, or to his government; or I deſire my Wife to take care of my Children, all theſe imply the Teſtators meaning to be ſo, and they ſhall be confirmed Tutors.

The Office of a Tutor is to provide for the Infant, faithfully to adminiſter his Goods and Chattels, and to account for all received by him: and if any take away the Pupil or his Goods, he may cite them, and make them reſtore them in the Eccleſiaſtical Court.

The Tutor may ſell *bona peritura*, but not Goods immoveable.

If a Teſtator Will that *A* ſhall educate his Children, and have the diſpoſing, ſetting and letting of his Lands, yet he may not ſell them, for the words, diſpoſe, ſet, and let, properly bear no ſuch meaning.

As to the diſpoſing of Goods, we are to obſerve, that moderate Funeral expences are to be paid out of the whole, and Diſtribution.

them Debts, *quæque ſuo ordine*, but if the Executor pay Legacies, and there be not ſufficient left to pay Debts, he ſhall pay *de bonis propriis*, it being a waſt in him. *Cro. Eliz.* 646. the 5 Report *Duke* and *Littletons* Caſe. *Cheynies* Caſe. 33 *Eliz. B. R.*

If there be a Wife and no Child, or a Child or Children, and no Wife, the Goods ſhall be divided into two parts, and the Teſtator can but deviſe one half; but now ſee the *Stat.* 22 *Car.* 2. *Cap.* 11.

And if there be Wife and Children or Child, which Child is Heir, or which Children were advanced by his Father, in his life time, in ſuch caſe, the Wife ſhall have half, and the Teſtator may diſpoſe of the other moiety. But ſee *Ratcliffs* Caſe, 3 Rep. But it is alſo held that a Child preferred ſhall have as in *Hotchpot* if he will caſt in his ſhare. See *Fitz. and Brook. de rationabili parte bonorum.*

Although the Law leaveth all to be diſpoſed of by the Teſtator, yet in many places he is reſtrained by Cuſtom. But note, it ſeemeth he may diſſeize of Leaſes, eſpecially where it is cuſtomable for the Wife and Children to have a *ratable* part

part of moveable Goods and Debts. *Bro. Tit. Exec.*

Patrimonium patris munus, because it is to prefer.

Matrimonium matris manus, because she is to nourish and breed up the Child.

If *A* be seized of 30 Acres, and have Issue 2 Daughters, and he bestow 10 Acres in Frank-marriage with one of them, and die seized of 20; the married Sister may cast up in *Hotchpot*, and have a new division and moiety.

CHAP. IV.

Exposition of Testaments.

TEstaments shall be favourably expounded, and according to the intent and meaning of the Testator (which intent ought to be manifest and not doubtful. *Co. 6. Wilds* Case) because he is supposed to be *inops consilii*.

Words in a Testament seeming to tend to a condition, as (If, Provided, and such like) shall not be taken in Law for conditions, where the intent of the Testator,

appeareth not to defeat the whole Eſtate deviſed thereby, but for a limitation; as for example. *A* ſeized of Lands in Fee, hath iſſue *B*, which Lands he deviſeth to *C* in Tail, the remainder to *D* in Tail, with divers other remainders, Provided, that if any of the In-tailees, bargain, or ſell the Land, or any part thereof, that from thenceforth, ſuch perſons ſelling, ſhall be utterly excluded, and the Land to remain to the next in Tail, as if ſuch perſon had not been named in the Teſtament; in this caſe the expoſition ſhall be, until ſuch Perſon in the In-tail ſhall alien, he ſhall have as before: and ſo it is a limitation, and not a condition. For if it were taken for a condition, then *B* his Son ſhould enter, for he only is *prius* (and none but *priuſes* may enter for a condition broken) and then all the Eſtates were determined, which were contrary to the intent of the Teſtator. But by limitation it is otherwiſe. *Plow. fo.* 412. *Scholaſticas* Caſe.

Only ſuch Eſtate as cannot be by the Rules of the Common Law conveyed by an Act executed in the life of the Teſtator, with advice of Counſel, ſuch Eſtate cannot be deviſed by Teſtament. As if

A deviſeth Land to *B* in Fee, and if *B* do not ſuch an Act, that *C* ſhall have the ſame to him, and his Heirs, this is void: for ſuch limitation if it had been by Act executed, had been void. *Et ſic de cæteris Co. Rep. Corbets* Caſe *fol.* 86.

CHAP. V.

Of the Forms of Teſtaments.

THe ſubſtantial or eſſential form of a Teſtament is the naming of an Executor, which without it is no Teſtament: for the Executor is in the place of the Teſtator, and compellable to pay Debts ſo long as he hath Aſſets; without naming an Executor it is but a Codicil, be there never ſo many Gifts or Legacies contained therein, and Adminiſtration is to be granted, as of one dying Inteſtate, unto the Wife or next of Kin.

But be it ſolemn, or unſolemn, written or *nuncupative*, priviledged or unpriviledged, the naming or appointing of an Executor without more ado, makes a good Teſtament.

An Executor may be appointed ſimply or conditionally, from a time or to a time certain, generally or particularly in the firſt, ſecond, third or fourth degree. Simple nomination, as, I make, Inſtitute or Will that, or deſire that *A* be my Executor, or *A* ſhall, or let *A* be my Executor, or I commit all may Goods to be diſpoſed of by *A*, or I will that *A* diſpoſe of thoſe Goods in his poſſeſſion; in the firſt he ſhall be adjudged Executor of all; In the ſecond of ſo much as are in his poſſeſſion only.

The word Executor needs not always to be expreſſed in a Will, but *circumlocutory* words will ſerve, ſo as the Teſtators meaning be certainly known, but when it is doubtful whether the perſon named be a general Legatary or Executor, great care muſt be taken to determine, whether a Will or not a Will.

A Teſtator makes his Will by entreaty or interrogation of another perſon, as if one demand if he will make *A* Executor, and he anſwer yea, or I do, this is a good nomination, ſo as he be then purpoſed and intended to make his Will; for be the words never ſo plain, if the Teſtator were in fear, jeſt or drink, though he ſay I

make

make *A* my Executor, yet it is void, becauſe he had not then *animum teſtandi.*

As nomination of an Executor is pure and ſimple, being without condition, ſo of Legataries, *mutatis mutandis*, in all things always according to the Teſtators meaning: Therefore if *A* deviſe to *B* all his Lands and Tenements, all in poſſeſſion and reverſion paſs by the word Tenements.

Land is deviſed to *A* to have for evermore, or to him and his Aſſigns, there the Deviſee hath a Fee-ſimple; but in a Feoffment, ſuch words create but an Eſtate for the Feoffees life.

A deviſe of Lands is made to *A* thus, to give or ſell, or do with at his pleaſure, this makes a Fee-ſimple.

A deviſe of Land is made to *A* and his Heirs males, this is an Eſtate Tail, but in a Feoffment the ſame words make only a Fee-ſimple, becauſe thereby it does not appear of what bodies the Heirs ſhall be begotten.

Lands are given by Deed to *A* and the Heirs males of his body, he hath iſſue a Daughter, who hath iſſue a Son, and dies, the Son of the Daughter ſhall not have it, but it ſhall return to the Donor.

But if the same were so given by a devise in a Will, he, viz. the Son of the Daughter should have it.

A devise made to an Infant in the Mothers Womb is good, but contrary of a Deed, Feoffment, Grant or Gift, for they being made to such are void.

A devise is to *A* and his Heirs Females of Land, the Devisee hath a Daughter and Son, and dies, in this case the Daughter shall have the Land, and not the Son though he be Heir.

A devise of Land is to *A*, charging him with payments, of near the value of the profits during his Life, though there be the word Heirs, or Assigns, or for ever, yet this is a Free-simple; But a devise of Land to *A* in Fee, and if he die without Heir, then to *B* in Fee, this is a void remainder, because one Free-simple cannot depend upon another. So Land was devised to the Prior and Covent of *B* so as they paid to the Dean and Chapter of *P.* 10 *l. per annum*, and in default thereof, their Estate to cease, and the Land to remain to the Dean and Chapter, this is a void remainder, for it could not be limited after an Estate in Fee, and the Heir, not the Dean and Chapter shall take advantage of the condition.

A

A Legatary may take his Legacy without delivery by the Executor; But there is not remedy to recover a Legacy by the Common Law, but only by citation before the Ordinary: But a Legatary poſſeſt of his Legacy, at the Teſtators death, may retain it, if there be ſufficient to pay Debts beſide.

Conditions ſome are, 1. Neceſſary. 2. Some impoſſible. 3. And ſome poſſible or indifferent.

1. Neceſſary in reſpect of Fact, as if the Sun riſe. 2. Neceſſary in reſpect of Law, as a condition to make one Executor to give 100 *l.*

2. Impoſſible conditions, and theſe have four ſorts of Impediments. 1. Of Nature, as to give one 100 *l.* if he touch the Sky with his hands, or drink up the Sea. 2. Contrary to Law deemed impoſſible, as if he murder a Man, or deflower a Maid, for *id poſſumus, quod de jure poſſumus.* 3. Hard to be performed, as a baſe Subject to marry the Kings Daughter. And 4 of contrariety and repugnancy.

3. Poſſible conditions or indifferent, of theſe, 1. Some are caſual, as to give 100 *l.* if the King of *Spain* die this year, 2. Others

2. Others are Arbitrary, as if one go to Church. But here note, that conditions, unlawful, impossible and dishonest are absolutely void.

Every condition must be precisely performed, for performance in part will not suffice, for the whole meaning of the Testator therein, must be performed.

A condition that one go to Church on *Easter*-day, and he endeavours so to do, but he is hindered by great Floods, or other lawful impediments, the condition is performed: But if in going to Church he commit an offence, and be stayed for it; this is not a performance of the condition, when the condition cannot be performed by the Testators default, this is no bar to the Legacy, as a Legacy is given on condition, that he bury the Testators body in St. *Peters* Church in *York*, and he dies excommunicate.

Executor or Legatary under some possible condition admittable, putting in caution to perform the condition, or make restitution.

Condition is, that *A* Marry the Testators Daughter, he is ready and willing,

willing, but ſhe refuſes, this is doubtful, for he muſt perſevere if he will have the benefit, for though it ſeem the condition be performed in Law, yet is it not performed in fact according to the Teſtators meaning: But it is contrary if the Teſtator remitteth to him a Debt upon ſuch condition, and he offereth to marry her: or if he be poſſeſſed of the Executorſhip, or Legacy in the mean time before ſhe repent, or if 100 *l.* in ſuch a Cheſt, or a white Horſe be given on ſuch condition, upon the firſt refuſal, the Executor or Legatary will have a right.

Condition is, he or ſhe marry according to the appointment, arbitrement or conſent of *A*, the condition is unlawful, but the Legacy is good, though the Marriage be without ſuch conſent.

Condition is, that thou Marry not a Widow, or this, or that particular Woman, is good, and if thou perform it not, no Executorſhip or Legacy ſhall paſs, becauſe thou haſt liberty beſides.

A Legacy is given upon condition, that thou Marry the Teſtators Daughter, thou muſt not Marry firſt another Woman,

Woman, and afterwards her, for it is a condition affirmative, and intended to be meant of first Marriage, and so the Legacy is void. But in negative conditions, as if thou do not Marry the Testators Daughter, here if thou Marry two or three, and her at the last, yet the Legacy is good, for here not the first Act alone, but all subsequent Acts are regarded.

A Condition, in respect of place is good: As that one shall not Marry at *York*; for he is at liberty to marry elsewhere.

Land is given to a Man, and the Heirs of his Body, on condition, he nor his sell by Feoffment, *&c.* Here, if he or his Heirs sell; the Donor or his Heirs may enter, for this is in favour of others, and herein the Common Law, and the Ecclesiastical agree.

Prohibition in a Will, to sell a Cup, Ornament, Gift of a Prince, Prize got in War, *&c.* is good, unless the Goods will not amount to pay Debts: or if it be so far from him, that he cannot have profit or use of it, he may sell it, or if he be the last to whom it is limited.

One

One by his Will giveth *A* the residue of his Goods, and makes him Executor, on condition he do not sell the same; *A* must enter into Bond not to sell, before he can be admitted Executor: which Note,

As to time when conditions are to be performed, when no certainty thereof is expressed; it must be done as soon as with conveniency it may after the Testators Death.

A makes *B* Executor, on condition that he give 10 *l.* to the Poor, he may do it at any time in his life; but the Ordinary may appoint the time, and if he fail, may grant Administration. But a Legacy given on condition that he give 10 *l.* to the Poor, he must do it as soon as he is able after his Testators Death, or else he will lose his Legacy.

There are also casual Conditions, as if a Ship come from *Venice*, thou must attend, and if it come in thy Life, good: but if thou die before, thy Executor cannot have it, though it return after thy death.

Condition is, (if such a one die without issue, this is much to be taken notice of,)

of,) for a Baſtard ſhall not be deemed iſſue, though the Parents inter-marry after the birth, and ſuch are iſſue natural, not lawful, nor may they inherit. But if *A* have iſſue by *B* his Wife, this is lawful, not natural; ſo if one marry a Woman, with Child by another, albeit born the next day, yet the Husband muſt be Father; *For whoſe is the Cow, his is the Calf.* If a Wife cohabit with an Adulterer, yet if it be poſſible that the Husband may come to her, the Husband ſhall be preſumed the Father, nay though the Wife own the Adulterer, and the Child be like him, for that might happen by the Mothers conceit, at Conception, ſo *Jacobs* rods, *Ethiopian* picture, *&c.* but if the Husband were not at the time of Conception, within the four Seas, or far diſtant, or impriſoned, it will be judged otherwiſe: Alſo if diſabled by Nature or old Age. In no caſe, ſuch Children ſhall inherit.

If a Child be born alive, and heard cry, the Father by the courteſy of *England*, ſhall have the Land for his Life, otherwiſe if it were an abſolute abortion.

Remedy

Remedy for Creditors and Legataries, during the ſuſpence of the Condition.

For they are due preſently; therefore it is provided by the Statute of *21 H.* 8. and *32 E.* 3. that Adminiſtration be granted to the Executor for ſo long time as the condition depends.

If a Condition be delayed to be performed by an Executor, it being in his power, it is his fault, and he ſhall be excluded.

An Action againſt an Adminiſtrator ſhall abate, if there be an Executor which will prove a Will, after the Adminiſtration granted. The Ordinary may appoint a time to every Executor at the petition of Creditors to prove the Will, and if he refuſe, Adminiſtration may be granted unto ſuch as have intereſt until the condition be extant; or he may grant a Letter *ad tollendum bona defuncti*, but upon ſuch Letter an Action will lie againſt the Ordinary, as it might have done againſt the Adminiſtrator, yea though ſuch one ſell *bona peritura*, he may be ſued as Executor in his own wrong.

Ten

Ten pound a year given to one by a Teſtator, till his Son attain 21 years of Age is good, till he ſhould attain, though he die in the mean time.

If the Executorſhip be only limited, and the time of Age not joyned to the ſubſtance, as I give to *A* 100 *l.* and I will the ſame be payed when he comes to 21 years of Age, and he die in the mean time, yet the Executor or Adminiſtrator ſhall recover it.

An Executor may be particular, as of his Goods, *&c.* in *Yorkſhire*, or Univerſal as of all his Goods: the particular Executor is only chargeable ſo far as he Adminiſters, and cannot meddle with the reſt: But if one make *A* an Univerſal Legatary, or give him the reſt of his Goods, and make no other Executor, he ſhall be deemed Executor, at leaſt Adminiſtration may be granted to him.

Two are made Executors, one dieth, his Executor may not joyn with the firſt Executor in the execution of the Will: and if ſuch Executor of Executor, have any of the Teſtators Goods, the firſt Executor may have an Action for them, and if the ſurviving Executor die inteſtate,

teſtate, yet the Executor of the Executor cannot meddle. Alſo if one Executor be a Babe, or beyond Sea, the other is admittable in the mean time.

If all or one Executor, refuſe to undertake the Executorſhip, the other may ſue or be ſued: But firſt there muſt be ſummons and ſeverance: but if the refuſing Executor afterwards become willing, he may joyn with the Executor and be admitted, and if he releaſe a Debt due to the Teſtator it is good, ſo it be releaſed before Judgment.

One releaſes a Debt due to *A* and after takes Adminiſtration of the Goods of *A* the releaſe is void, for that there was no right of Action at the time when it was executed.

Two or more Executors, are named, all refuſe but *A*, and he proves the Will, and after maketh *B* his Executor, and dies, the reſt who refuſed may not joyn with *B*, but he may ſue, or be ſued alone, for the firſt Teſtators Goods, *Bro. Tit. Exec. Dyer* 35. *fol.* 160.

Divers Executors are named, one getteth poſſeſſion of Goods, the other have no remedy againſt him for any part, for one Executor may not ſue ano-

ther, but in caſe the Teſtator give to one Executor the reſidue of his Goods, he may retain them or ſue any other that holds them; but if he give all his Goods to his Executors, they are to be divided and the Ordinary hath power to prevent fraud among them. But if one Executor die, the ſurvivor ſhall have his part, unleſs the Teſtator appoint that the Goods ſhall be equally divided, for thoſe words (equally divided) in a Will, do make a Tenancy in common.

Two Witneſſes void of exception, ſufficient to prove a Will: but if the Teſtator ordain that one Witneſs whom he nameth and truſteth, ſhall prove the Will, and he doth it, this is good proof; But a ſolemn Teſtament muſt be proved by ſeven Witneſſes, and every one muſt ſet his Hand and Seal to it.

Any Language, Hand, or Character is good for a Will, ſo that it may be underſtood. *& vitium Scriptoris* will not hurt, for as *falſa Orthographia non vitiat Chartam: Sic nec Teſtamentum.*

In Nuncupative Wills and Teſtaments it is good to avoid obſcurity and ambiguity.

CHAP.

CHAP. VI.

What Perſons may be capable of Executorſhip or Legacies.

A Teſtator may exclude his own Children, and make a Stranger his Executor, or Villain; if he make a Villain of his own Executor, it is a *manumiſſion*; but a Villain of another being named Executor, may have an Action againſt his own Lord.

A Woman ſole is Executrix, ſhe marries, her Husband alone may releaſe a Debt due to the Teſtator.

An Infant Executor, may releaſe a Debt due to his Teſtator, during his Minority, ſo as he receive due ſatisfaction for the ſame.

If a Child be under 17 years, he muſt have a Tutor, and ſuch Tutor may ſell any of the Teſtators Goods, but for neceſſity only.

A Teſtator making his Debtor Executor, the Debt is extinguiſhed if he prove the Will: Alſo making a Creditor Executor, when he makes an Inventory, he may detain his own Debt firſt.

A and *B* bound to *C* for Mony, *C* makes *A* Executor, by this the Bond is releaſed; *A* indebted to *C*, the ſaid *C* makes *A* and *F* Executors, *A* dies, *F* ſhall have no Action againſt the Executor of *A* for that Debt: But if the Teſtator be indebted to *A*, and makes him and *B* Executors; if *A* refuſe to prove the Will, and *B* prove it, *A* may have Action for his Debt againſt *B*: ſo Debt by Teſtator is not extinguiſhed by naming a Creditor Executor, unleſs he Adminiſters: But Debtor refuſing to Adminiſter, being named Executor, the Debt is extinct unleſs there want Aſſets to pay Creditors.

A Colledge, City, or Univerſity, may be appointed Executor: but an *Apoſtata* is incapable to take or make Executor: So Felon attainted, and excommunicate perſons.

Church-

Church-Wardens, are no lawful Corporation in every reſpect, but in ſome reſpects they are ſuch a Corporation, as may ſue for a Legacy given to the Pariſh.

Convict Recuſant at the Death of the Teſtator, or time of Adminiſtration granted, diſabled to be Executor, Adminiſtator, or Guardian in Socage or Chivalry. See the *Stat. 3 Jacobi.*

CHAP. VII.

Of the several kinds of Executors.

THere are three ſorts of Executors. 1. From the Law, as the Biſhop, or Ordinary. 2. The ſecond is made by the Biſhop or Ordinary. 3. The third by the Teſtator himſelf.

If an Executor refuſe, or cannot prove the Will, the Ordinary may grant Adminiſtration, *cum Teſtamento annexo*, and this Adminiſtrator is charged to perform that Will, and is called *Executor Dativus*, for he is the Ordinaries Deputy or Steward.

The Ordinary may call to an account, and revoke his Authority, and ſuch revocation may be ſecret or implyed, as Adminiſtration granted to *A* and after to *B*, the grant of the later revoketh the firſt, as a later Will revokes a former. All Acts done by *A* before ſuch re-

revocation are good, 27 *H.*8.26. *per Fitz.* 4 *H.* 7. 14. *per Tremaile.* *Bro. Novel* Caſes 330. *Executor Teſtamentarius*, being one ſo made by the Teſtator, may without Authority from the Ordinary poſſeſs himſelf of his Teſtators Goods and Chattels, and after probate of the Will, may commence Actions. But if he be a meer Executor, he may not convert the reſidue of the Goods to his own uſe, but be accountable for them, neither is he to have any other benefit than what is appointed by the Will, or allowed for his charges or pains by the Ordinary, and if ſuch Executor die Inteſtate, from thence-forth his Teſtator ſhall be ſaid to die Inteſtate, and Adminiſtration *de bonis non Adminiſtratis* ſhall be granted.

An Executor (ſome ſay) is not compellable to prove the Teſtament before Citation: but if he be cited and refuſe, he ſhall loſe his Legacy, and the Ordinary may grant over Adminiſtration to another, until he will accept, *&c.* but if he hath medled with any of the Teſtators Goods he is compellable to ſtand to it.

If Adminiſtration be granted, where a Will may or can be produced, and the Executor hath not refuſed; the Executor

may bring an Action of Treſpaſs againſt ſuch Adminiſtrator, if he medled. *Vid. Br. Abridgement des Caſes edit* 1599. *Tit. Adminiſt.* 112. *fol.* 183.

To him that is deſirous to know whether it be better to accept, or refuſe Executorſhip it is to be known. That,

Executor is chargeable to Creditors ſo far as the Goods do extend, but for Debts due to the Teſtator, he ſhall not be charged with Aſſets, for they are things in Action, and not in Poſſeſſion, yet he muſt uſe diligence to obtain, and get them in.

The Heir ſhall have none of the Goods or Chattels of the Deceaſed, nor ſhall the Executor have any of the Lands, Tenements, or Hereditaments, unleſs the Will appoint them to ſell Lands, for which if two or three be appointed, and ſome refuſe to prove the Will, the reſt that prove it may ſell notwithſtanding.

If the Teſtator appoint his Executor to ſell Land, and to diſtribute the Mony *in pios uſus*, and they enter and convert the profits to their own uſe, for two or three

three years, the Heir may enter upon them, and exclude them, for the Frank-tenement is in him; neither if one Executor die before ſale, may the ſurvivour ſell, but contrary if the limitation be for payment of the Teſtators Debts, for then the ſurviving Executor may ſell. 39 *Aſſ.* 17. And it ſeemeth by the iſſue in that Book that any one of the Executors may by himſelf ſell the Land without his Companions though they be alive, and notwithſtanding that they have but a power and authority given them, which is joynt, and in moſt caſes muſt be performed according to the limitation, but it ſeemeth that, that is admitted for the ſpecial reſpect the Law hath to have the Debts of the Deceaſed paid. *Vid. Fitz. Tit. Aſſ.* 336. *Et Executors* 117.

An Executor may recover or diſtrain for Rents, Fee-Farms, Annuities and Arrearages, as his Teſtator might have done; Alſo the Husband may do the like, for Rent due to his Wife ſhe being dead.

An Executor of an Executor in all caſes may ſue for the firſt Teſtators Goods, and be ſued for his Debts, as the firſt Executor might: neither ſhall the Goods

Goods of the first be put in Execution for the second Testators Debt, but those Goods must come to the second Executor by relation, and thereby the property of them which was before in the first Executor, is conveyed to his Executor.

A being Administrator to *B*, names *C* his Executor and dies, *C* may not meddle with the Goods of *B*, but new Administration shall be granted to the Friends of *B*.

If an Executor after due admonition given, refuses to prove the Will, he shall lose his Legacy, but contrary if he were not summoned to stand to it. Neither doth a Wife lose her thirds, nor Children their filial portions by refusing to prove the Will.

A Wife Executrix cannot sue or be sued without her Husband, but she may do any extrajudicial act, as receive or release Debts, or pay Legacies without her Husband: But if she die he can no more meddle: And such Wife Executrix may make her Will, and name an Executor.

If there be three or four Executors, two or one may release any Debt without his Companions, unless it be upon

Judg-

Judgment: But it is not ſo with Adminiſtrators, for they have but one Authority given them by the Biſhop over the Goods, which Authority being given to many is to be executed by all of them together.

An Executor muſt pay Debts, before Legacies, elſe if thereby ariſe a want of payment of Debts, he ſhall pay out of his own Eſtate. Here note, that of Debts, ſome are to be preferred before others, *Cro. Eliz.* 646. as Judgment before Recognizance, *&c.* 5 *Rep.* 28. *Harriſons* Caſe, *Leon.* 3. 270. *Bond* and *Bails* Caſe. So ſome Legacies are to be preferred. 28, 29 *H.* 8. *Dyer* 32. 4 *Eliz. Dyer* 280, *or* 208 *Dyer.* 7 *Eliz.* 232.

As to the time for proving a Will it is Arbitrary, firſt year or ſecond, or when it ſhall pleaſe the Ordinary to ſend a Citation. Time.

The duty of the Executor, is to prove the Will, pay the Teſtators Debts, and Legacies, and make an account for the reſidue, and therefore the Inventory ought to be made before the Executor meddle with the Goods; Into which Inventory are to be put Goods, Chattels, Merchandizes, all Rights and Leaſes, Em- Office.

Emblements, Corn growing, (but not Graſs or Trees growing, for thoſe belong to the Heir, ſo do things affixed to the Free-hold, alſo Glaſs in Windows, nailed or not nailed, Wainſcot and the like) but all other Goods and Chattels are to be put into the Inventory, and the Ordinary may appoint a time to bring in the Inventory. *See the Stat.* 22 *&* 23 *Car.* 2. *Cap.* 11. But an Executor medling with Goods, unleſs for Funerals, *&c.* not having made an Inventory, is ſubject to Eccleſiaſtical cenſure, although the Acts done by him before *Probate* are good in Law.

Teſtaments are to be proved before the Biſhop of the Dioceſs, except in certain Seigniories or Juriſdictions, or where there are *bona notabilia* in divers Dioceſſes; and good Debts amounting to 5 *l.* due by one or more in ſome other Dioceſs or particular juriſdiction, yet within that Province, do make *bona notabilia* as well as Goods and Chattels, real or perſonal.

If the Metropolitan pretend that a Man within any Dioceſs of his Province die poſſeſſed of *bona notabilia*, where indeed he hath none, and grant Adminiſtration

ſtration therefore of the Goods, this is not abſolutely void, becauſe the Metropolitan hath Juriſdiction in all Dioceſſes within his Province, yet nevertheleſs it is voidable. But if the Ordinary of a peculiar Juriſdiction, grant Adminiſtration of the Goods of one dying poſſeſſed of *bona notabilia*, this is abſolutely void, even for the Goods in his own juriſdiction: for the Prerogative Court ought to grant the ſame.

A Will is to be proved two ways, the 1. in *Communi forma*, and here no perſon is cited, but the Executor makes Oath that it is the Teſtators laſt Will. Or, 2. In form of Law, and this muſt be done *per teſtes*, wherein there muſt be publication and a definitive ſentence.

A Will proved in common form in abſence of them which have intereſt, the Executor is compellable to prove the ſame again in form of Law, and if the Witneſſes be dead, it will endanger the whole Teſtament, unleſs 10 years be paſt ſince the *Probate*: But being once proved in form of Law, no more to be drawn in queſtion.

Fees due for *Probate* of Wills are, if the Goods be under 5 *l.* ſix pence to the Re-

Regiſter; if above 5 *l.* and under 40 *l.* three ſhillings ſix pence to the Ordinary, and to the Regiſter one ſhilling. If above 40 *l.* to the Ordinary 2 *s.* 6 *d.* and as much to the Regiſter by 21 *H.* 8. For the Copy of the Will and Inventory, no more than was payed to the Regiſter for *Probate*, or a penny for ten lines at the Regiſters Election: upon forfeiture of the overplus taken, and 10 *l.* to the King and the Informer.

The courſe of Debts in order to payment we have already ſpoken of, we ſhall only here note, that if there be divers Obligations, the Executor may pleaſure which of the Creditors he pleaſeth firſt, and the other have no remedy, though Aſſets be wanting. *Doctor* and *Stud. Lib.* 2. *Cap.* 10.

If two commence Suits for ſeveral Debts, he that firſt obtains Judgment ſhall firſt be paid; an Executor may plead a dilatory Plea, as in abatement of the Writ, by Eſſoyn, imparlance to one, and then another commence a Suit, to whom he confeſſes a Judgment, that Judgment ſhall be ſatisfied firſt, though the others Suit was commenced before: but an Executor may not plead a falſe plea to delay

delay him that firſt commenced Suit. *Doctor* and *Stud. Lib.2. Cap.*10.

Mortuaries.

No Mortuary is to be paid under ten marks in moveable Goods, upon forfeiture of the *ſurplus*, and 40 *s.* to the party grieved, by 21 *H.* 8. neither is it payable but where accuſtomed, and due but in one place, where the party was moſt inhabiting.

Above ten marks clear, his Debts being paid, and under 30 *l.* ſhall pay for a Mortuary 3 *s.* 4 *d.* between 30 and 40 *l.* 6 *s.* 8 *d.* above 40 *l.* ſhall pay 10 *s.* and this is to be paid before a Legacy without defalcation.

Account.

It is neceſſary that an Executor make his account and procure his diſcharge by Acquittance or otherwiſe, for he is ſubject to be called to an Account judicially, both by Creditors and Legataries, and that within a year, or when the Ordinary pleaſes, wherein he muſt declare what Goods and Chattels, have come to his hand,

hand, what Debts and Legacies he hath paid, in which leſſer ſums may be proved by his own Oath, and greater ſums by Witneſſes: And the reſidue ought to be diſpoſed as heretofore in *pios uſus*, but the Executor hath uſually detained them, upon pretence more Debts may appear. But ſee what is now to be done by the new Stat. 22, 23 *Car.* 2. *Cap.* 11.

In this account, all Funeral expences, juſt payments, and reaſonable charges are to be allowed.

An Executor not being reſolved to meddle as Executor, then muſt not Adminiſter the Goods as Executor, for then he is compellable to undertake the burthen: in the mean time he is ſubject to all ſuits of Creditors, and cannot ſue for want of the Will being under ſeal of the Ordinary.

If a Creditor take but ſo much of the Teſtators Goods as his own Debt amounts to, yet he is Executor in his own wrong: But to take the Teſtators Goods to preſerve them from periſhing or to diſpoſe of part thereof for the Funerals, or to make an Inventory, makes him not Executor in his own wrong.

CHAP.

CHAP. VIII.

How Teſtaments become void.

TEſtaments become void by ſeveral means, as when they are made through fear, immoderate flattery, fraud, incertainty or imperfection, or the Teſtator hath not *animum teſtandi.* But if ſuch a Teſtament after the fear is paſt be confirmed or ratified, it will be good.

Error in quality to avoid a Will is this, as I make my Couſin *J* my Executor, or becauſe thou haſt lent me 100 *l.* I give thee 100 *l.* or for that my Son is dead, thou ſhalt be my Executor, when in truth there is no Couſin *J*, no Mony lent, nor his Son dead.

Error in quantity is, when a Teſtator meaning to bequeath a fourth part of his Goods, it is ſet down half, or intending to give 50 *l.* the Writer ſetteth down

100 *l.* or *e contra*; or I give to *A* all the Debts he or *B* oweth, and he owes nothing, all theſe bequeſts will be void.

But if one give *A* 10 *l.* which he owes him, if the Teſtator be in good memory at the time of the gift this is good. So if one give 10 *l.* being in ſuch a Cheſt, and there are but 5 *l.* found, yet it will be good for the 5 *l.* But if the Teſtator believed 10 *l.* to be there, unleſs the Executor can prove that the Teſtator knew there was but 5 *l.* it ſhall be good for the whole 10 *l.*

A Will may alſo be void for incertainty, as I make one Man of the World my Executor, unleſs there be plain proof whom the Teſtator meant, it is abſolutely void.

One made his Will, and named *J S* his Executor, whereas there were two or three of that name, this ſhall be void to all, unleſs the Teſtators meaning appear to one or other more familiar or friendly with him, then he ſhall be admitted; or if they be all of Kin, the neareſt of Kin ſhall be admitted.

If one give a Legacy to a Church, his Pariſh Church ſhall be underſtood, ſo a Le-

Legacy to the Poor, ſhall be intended to the Poor of his own Pariſh, but if he have any poor Kindred, they are principally to be regarded.

It hath been held that the Mother is not a Kin to the Child, and to that purpoſe it was long argued in the Duke of *Suffolks* Caſe, 39 *H.* 6. *fol.* 31. but ſince hath beed adjudged to the contrary, 3 Rep. *Ratcliffs* Caſe, and 21 *H.* 8. 5. Or if one make the next of Kin Executor, the Mother ſhall be admitted before any but his own Children, *viz.* before either Brother or Siſter, according to the *Stat.* 21 *H.* 8. *See Bro. Novels* Caſes 5 *E.* 6. *Num.* 415.

A Teſtator gives a Horſe and hath none, yet it is a good Legacy: the contrary hath been held by ſome of Sheep, or a gold Chain, that if there be none, the Legacy is void, but the better opinion is that it is good.

A Legacy of Land, Mony, Wheat, *&c.* is uncertain, and ſo naught, but if it be added for building Bridges, repairing Highways, maintaining or relieving Poor, then ſo much as by the Ordinaries appointment ſhall be thought fit, ſhall go to perform the intent.

Bona animi, corporis, fortunæ, viz. Virtue, Health, Wealth, are by the Civil Law termed. 1. Moral. 2. Natural. 3. Caſual. The firſt and ſecond are not in our diſpoſe, and therefore the Law takes notice of the third, *viz.* caſual, under which the Civil Law takes in Lands, Leaſes, Obligations, Debts, and all other Goods, his Debts paid. But the Law of this Realm takes in only Houſhold-Goods, Chattels perſonal, *&c.* But nothing that is of the Nature of Free-hold, nor Leaſes for years, (much leſs for life) nor *Choſes* in Action, as Debt upon Promiſe or Obligation.

Chattels ſignifie all Goods, moveable and immoveable, unleſs ſuch as be of the nature of Free-hold; Of Chattels ſome be real, as Leaſes for years, ſome perſonal as moveable Goods, Mony, Plate, Houſhold-ſtuff, *&c.* but Hawks and Hounds are no ſuch Goods.

Goods moveable are ſuch as actively move of themſelves, or paſſively are moved by others.

Immoveable Goods are ſuch as are not dependent upon the perſon, but to ſome other things, as Trees growing, Fruit on Trees, Leaſe or Rent for term of years.

years. But no Lands, Tenements, or Franktenements.

Admit four ſeveral perſons, make four ſeveral Wills, wherein the firſt gives *A* all his Goods, the ſecond gives *A* all his Chattels, the third gives *A* all his movevable Goods, and the fourth gives to *A* all his immoveable Goods. In this caſe, *A* is to have the firſt Teſtators whole Eſtate, being in effect his Executor, Heir or Univerſal Succeſſor: Alſo he is to have all his Debts, and pay all his Debts, and all his Mony of what Coyn or Mettal ſoever. And ſo it is as to the ſecond Teſtator in all things; And if *A* die before he prove ſuch Will, Adminiſtraon is to be granted to the next of Kin of *A*, not of the Teſtator: But the Teſtator giving *A* all his Goods or Chattels, if he make *B* his Executor, *B* muſt enter to all, prove the Will, pay the Debts and deliver over the *reſiduum* to *A* being Univerſal Legatary. But if the Teſtator have 100 *l.* and being indebted 20 *l.* bequeaths the one half of his Goods to his Wife, the whole to be divided, between her and *A* his Executor, here the Wife ſhall have 50 *l.* without defalcation, and the Executor muſt

pay the Debt out of the other half, which are Aſſets in his hands, and this caſe was ſo adjudged by two Chief Juſtices and others.

For the third Teſtator, *A* muſt have *bona moventia & mobilia*, all actively and paſſively moving or moveable, as alſo Fruits growing by Induſtry, as Corn, *&c.* but not natural, as Graſs, *&c.* but if Land be appointed to be ſold by Will, the Mony thence ariſing ſhall not be accounted as any of the Teſtators Goods or Chattels: Or if a Teſtator have bagged up Mony, ready ſhortly to be payed for Land bought, this may not be diſpoſed of in prejudice of the Heir. For the fourth Teſtator, by the word immoveable Goods, paſs all natural fruits, as Graſs growing, Fruit on Trees, Fiſh in a Pond, Pidgeons in a Dove-Coat, *&c.*

Goods moveable and immoveable, are given as a Legacy; it hath been much diſputed, if Debts and Obligation paſs, and it is agreed that they do, and alſo Rents and Arrearages thereof behind; but ſuch a Legatary of moveable and immoveable Goods cannot ſue for ſuch Rent, Arrear, or Debt in his own Name, for

for the Executor muſt recover them, and then may he ſue the Executor in the Eccleſiaſtical Court for the ſame, and if the Executor refuſe to ſue the parties, the Ordinary ſhall compel the Executor to give one or more, Letter or Letters of Attorny to the Legatary to ſue for the ſame in the Executors name, but to the uſe of the Legatary himſelf.

A gives all his Houſholdſtuff to *B*, by this *B* ſhall have Tables, Stools, Forms, Chairs, Carpets, Hangings, Beds, Bedding, Baſons, Ewers, Candleſticks, all ſorts of Veſſels, ſerving for Meat, Drink, being either of Earth, Wood, Glaſs, Braſs or Pewter, Pots, Pans, Spits, Kettles, and ſuch like; But Books, Weapons, Tools for Artificers, Cattel, Victuals, Corn in a Barn, Carts, Plough-gear, and Veſſels fixed to the Free-hold are not ſo eſteemed.

Plate uſed in the Houſe, as Cups, Bowls, Candleſticks, *&c.* are Houſholdſtuff, but ſuch as are kept only for ſhew or Ornament, being no otherwiſe uſed, ſhall not be reckoned as Houſholdſtuff, unleſs the Teſtators meaning appear in plain words otherwiſe.

If after a Teſtators Death, there be

found two Wills, the one made in favour of his Children; the other in favour of Strangers, that to the Children ſhall be confirmed. But if one Teſtament be proved, and the Executor poſſeſſed of the Goods, it is not afterwards to be diſproved, or he diſpoſſeſſed by means of another Will of the ſame date.

There are two Teſtaments, one to Children, another *ad pios uſus*, both of one date, that to the Children ſhall have the priority.

A Legacy is given of all his Debts, no more will paſs than thoſe Debts then due, not ſuch as grow due after the Will made. So if a Teſtator releaſes to *A* all his Debts, ſuch as grow due after the releaſe made ſhall not be diſcharged. The like of Apparel, Books, Houſholdſtuff, *&c.*

But in theſe and all Caſes the mind of the Teſtator muſt be reſpected.

A Teſtament begun, though not finiſhed is good, ſo far as it is proceeded in.

A draught of a Will not acknowledged by the Teſtator is no more a Will, than a draught of an Obligation is an Obligation unſealed.

A Teſtament found written, with the Teſtators hand in a Cheſt amongſt other Writings of account ſhall be good; if the ſame be dated and perfect.

The laſt Teſtament is beſt, and doth abrogate and annul all former, although the Executor refuſe or die before, or after the Teſtator. But if the later Teſtament be imperfect or the Teſtator compelled by fear or fraud to make it, it is void.

A Teſtament made 10 years before death is nevertheleſs good whatſoever after may happen: But a Teſtament is preſumed to be revoked, when the Teſtator and Executor become great Enemies; Alſo when the Teſtator in heat of Anger conceived againſt his Son, or ſuch as ſhould have Adminiſtration and afterwards they are reconciled.

A Teſtator after a Will made is attainted of Treaſon, Felony, Hereſie, or Apoſtacy, *&c.* unleſs he obtain a pardon, or be otherwiſe reſtored, the Will is naught.

If an Executor cannot, or will not prove a Will, it loſes the name of a Teſtament, and muſt be affixed to an Adminiſtration, yet the Legacies, are ſtill due.

An

An Executor muſt be capable at three ſeveral times. 1. At the making of the Will. 2. At the death of the Teſtator. 3. At the time of *Probate* thereof. But in conditional Teſtaments, the Executor and Legatary being capable at the time of the condition to be performed, is ſufficient.

Ademption of Legacies.

A Ship was given for a Legacy, which was afterward ſo repaired that little, yet ſome of the old remained, that makes the Legacy good; ſo of a Houſe repaired after a Will made: but if the old Houſe be wholly pulled down, and new builded of other ſtuff afterwards, this makes the Legacy void, ſo if blown down or fired by chance and new built: or if the Teſtator after the Will made, ſell or give away the ſame, this takes away the Legacy.

A Teſtator gives an Obligation to *A*, and after this the Obligor pays the Teſtator the Debt in ademption: but if the Teſtator conſtrain him to pay by courſe of Law, there the Legacy is extinguiſhed.

Tranſ-

Transferring of Legacies.

From one to another; as a Legacy is given to *A*, provided if *A* will not do ſuch an Act, to be void to him, and *B* to have it: *A* dies, yea before he can do it, yet was always willing to have done it, here the Legacy is not transferred.

A Teſtator gives 100 *l.* to *A* upon condition he pay for 10 years 10 *s.* a year to the poor, *&c.* and after he gives the ſame 100 *l.* to *B* without any condition, yet *B* muſt perform the firſt condition.

Lands are given by Will, *viz.* in the beginning of the Will to *A* in Fee, in the later end to *B* in Fee; this is to be decided by the Temporal Law, whereby *B* is to have it, becauſe it is the later deviſe, *& ratio partis ad partem ut totius ad totum.*

If Legatary become Enemy to the Teſtator, or give him a ſecret cauſe of hatred, though unknown to the Teſtator, by which (it may be ſuppoſed) that if he had known it, he would have taken away or deſtroyed the Legacy, this will make the Legacy void.

If

If a Wife depart from her Husband without conſent, or a Legatary accuſe his Teſtator of a capital Crime, or become a capital Enemy to the Teſtators Brother, or if the Legatary neglected to help him in ſickneſs through want whereof the Teſtator periſhed, or grievouſly defamed or ſlandered the Teſtator, any of theſe will cauſe him to loſe his Legacy.

A Legacy of 100 *l.* is given to *A* to be paid him at *Eaſter*, 1675. *A* dies before *Eaſter*, yet his Executor or Adminiſtrator ſhall recover, becauſe it was due at the death of the Teſtator. But if 100 *l.* be given to *A* when ſhe ſhall be married, and ſhe die before marriage, the Legacy is loſt. But if it be given for and towards her marriage, and ſhe die before, yet her Executor or Adminiſtrator ſhall recover it.

Debt is brought againſt the Ordinary, who, pending the Writ, commits Adminiſtration to *J S*, the firſt Writ ſhall abate, becauſe the Ordinary is compellable to grant the Adminiſtration by the *Stat. Bro Tit. Adminiſt.* 39. 31 *E.*3. *cap.* 11. *Raſt. Adminiſtrators* 1. *and* 21 *H.*8. *cap.*5. *Raſt. Probate of Teſtam.*3.

Where

Where the Ordinary commits Adminiſtration, he may revoke it and grant it to another (but all acts done by the firſt Adminiſtrator ſhall be good) and ſo it was held in the caſe between *Brown* and *Shelton* for the Goods of *Rawlins*, where the Adminiſtration was committed to *Brown* and revoked, and committed to *Shelton*, becauſe it was not an intereſt, but a power or authority only; which may be revoked: but the contrary is held of an intereſt certain. *Bro. Adminiſtrator. 33. in fine.*

If an Executor plead fully Adminiſtred in an Action of Debt, and give in Evidence, payment of Legacies: The Plaintiff in the Action of Debt, may demurr in Law thereupon, becauſe ſuch Adminiſtration is not allowable in Law before Debts are paid. *Bro. Tit. Aſſets inter maines* 10.

An Executor before *Probate* makes his Executor and dies, his Executor ſhall have Adminiſtration, 3 *Eliz. Dyer*, 372. *Iſteds* Caſe.

Where an Executor hath the *reſiduum* given him, there the Adminiſtration ſhall be granted to his Executor, but where the *reſiduum* is not ſo given, the next

next of Kin ſhall have it. *Littletons* Caſe, *5th Report.*

I ſhall only add what hath very Learnedly been held by a moſt Worthy and Honourable Perſon, and of profound reading in the Law, concerning the Eccleſiaſtical Court, *viz.* That it had not Original Juriſdiction, and that what Juriſdiction the Church claims, was given to it by the King, and that is proved by four principal reaſons.

1. That the Ordinary had not any power to diſpoſe *bona peritura. 9 Elizab. Dyer* 255. 5 *Rep. Needhams* Caſe.

2. If a Debt were due to the Teſtator or Inteſtate, the Ordinary had not power to recover it, nor could he commit it. *Co. 2. Inſt.* 398. *F. N. B. fol.* 91, 92.

3. It is a Lay thing, and ſome at this day have power to diſpoſe, who are meerly Lay. *Co.* 5. 16. 5 *Rep. fol.* 65. *B.*

4. For the manner of Trial, it muſt be in the Temporal Court. 13 *Eliz. Dyer* 294.

Much

Much more might be ſaid in this point, which for the greateſt part being mentioned in the fore-going Book; We will here ſet up at preſent our reſt.

FINIS.